PETITION FOR WRIT OF CERTIORARI

85-2067

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

JOSE MENDOZA-LOPEZ AND
ANGEL LANDEROS-QUINONES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether a defendant prosecuted under 8 U.S.C. 1326 for reentering the United States after having been deported may collaterally attack the validity of his deportation proceeding.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-7a) is reported at 781 F.2d 111. The opinion of the district court (App., *infra,* 8a-26a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 1985. A petition for rehearing was denied on March 18, 1986 (App., *infra,* 29a). On May 6, 1986, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including June 16, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. 8 U.S.C. 1105a provides in pertinent part:

(a) * * * The procedure prescribed by, and all the provisions of chapter 158 of title 28 [review of orders of federal agencies] shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title [proceedings to determine deportability] or comparable provisions of any prior Act, except that—

* * * * *

(6) * * * if the validity of a deportation order has not been judicially determined, its validity may be challenged in a criminal proceeding against the alien for violation of subsection (d) or (e) of section 1252 of this title [supervision of deportable alien and penalty for willful failure to depart] only by separate motion for judicial review before trial * * * .

* * * * *

(9) any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

* * * * *

(c) An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order.

2. 8 U.S.C. 1326 provides:

> Any alien who–
>
> (1) has been arrested and deported or excluded and deported, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,
>
> shall be guility of a felony, and upon conviction thereof, shall be punished by imprisonment of not more than two years, or by fine of not more than $1,000, or both.

STATEMENT

1. Respondents and 11 other aliens were found deportable at a joint deportation hearing before an immigration judge in October 1984. Respondents did not appeal the deportation order.[1] They were escorted across the border at El Paso and given a form that stated, in Spanish and English, that they would be subject to felony charges if they returned. Two months later, respondents were discovered in Lincoln, Nebraska. They were arrested and indicted for violating 8 U.S.C. 1326, which makes it a crime for any alien who "has been arrested and deported

[1] Respondents could have appealed the immigration judge's order to the Board of Immigration Appeals (8 C.F.R. 242.21) and then to a federal court of appeals (8 U.S.C. 1105a(a)).

or excluded and deported [to] * * * enter[], attempt to enter, or [be] found in, the United States" without the Attorney General's permission. App., *infra,* 9a.

The district court dismissed the indictments (App., *infra,* 27a, 28a). The court first ruled that a defendant in a prosecution under Section 1326 may collaterally attack the validity of the underlying deportation order (App., *infra,* 18a). It next determined that respondents were denied due process at their deportation hearing, because they had not been made aware that they could apply for suspension of deportation. The court acknowledged that the immigration judge had "technically" complied with the Immigration and Naturalization Service regulation requiring that the defendants be advised that they were eligible for suspension of deportation (App., *infra,* 22a).[2] The court stated, however, that its review of the hearing showed that "neither of the defendants in this case was in a position to evaluate [his rights] intelligently" (*ibid.*). The court went on to conclude that respondents were prejudiced because they might have obtained suspension of deportation had they been able to make an intelligent evaluation of the alternatives open to them (*id.* at 25a).

2. The court of appeals affirmed (App., *infra,* 1a-8a). It noted (*id.* at 2a) that in *United States* v. *Spector,* 343 U.S. 169, 172-173 (1952), this Court reserved the question whether a defendant can collaterally attack a deportation order and that the circuits are divided on the issue.[3]

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[2] The applicable regulation (8 C.F.R. 242.17(a)) provides that "[t]he special inquiry officer shall inform the respondent of his apparent eligibility to apply for any of the benefits enumerated in this paragraph [which include suspension of deportation] and shall afford him an opportunity to make application therefor during the hearing."

[3] The court listed (App., *infra,* 3a) *United States* v. *Petrella,* 707 F.2d 64 (2d Cir.), cert. denied, 464 U.S. 921 (1983); *United States* v. *Gonzalez-Parra,* 438 F.2d 694 (5th Cir.), cert. denied, 402 U.S. 1010 (1971); and *Arriaga-Ramirez* v. *United States,* 325 F.2d 857 (10th Cir.

The court then sided with those circuits that have permitted collateral attacks on deportation orders. The court held that "a material element of the offense prohibited by 8 U.S.C. § 1326 is a 'lawful' deportation and that, therefore, when prosecuting a section 1326 proceeding, the government must prove beyond a reasonable doubt that the defendant illegally entered the United States after being deported according to law" (App., *infra,* 3a).

The court rejected the government's contention that this issue is analogous to the issue presented in *Lewis* v. *United States,* 445 U.S. 55 (1980), where this Court held that a defendant in a prosecution for possession of a firearm by a felon could not collaterally attack the validity of his felony conviction. The court of appeals stated that "[i]n *Lewis* the prior decision was judicial, not administrative" and that "while it can be said that Congress had a legitimate interest in prohibiting the possession of firearms by those whose brushes with the law resulted only in invalid convictions, it cannot likewise be said that Congress intended to expel from this country all aliens, even those who have a legitimate right to be here" (App., *infra,* 2a-3a n.1).[4]

Judge Fagg, dissenting, noted that "Section 1326 clearly speaks only of the fact and not the quality of a previous deportation" (App., *infra,* 5a). He argued (*ibid.*) that just as the Court in *Lewis* held that Congress did not intend that courts should inquire into the lawfulness of felony convictions under the statute prohibiting possession of a

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1963), as not permitting collateral attack; it listed *United States* v. *Rosal-Aguilar,* 652 F.2d 721 (7th Cir. 1981), *United States* v. *Gasca-Kraft,* 522 F.2d 149 (9th Cir. 1975), and *United States* v. *Bowles,* 331 F.2d 742 (3d Cir. 1964), as permitting collateral attack.

[4] The court of appeals briefly addressed the question whether the district court was correct in holding that the deportation hearing was invalid. The court concluded that the district court had not clearly erred in that regard (App., *infra,* 4a).

firearm by a convicted felon, the court should not inquire into the lawfulness of previous deportations in prosecutions under Section 1326. Furthermore, he concluded (App., *infra,* 6a) that review of "the comprehensive scheme for judicial review that is available to aliens under 8 U.S.C. 1105a showed that Congress intended that aliens would not be permitted to challenge deportation orders during prosecutions for unlawful reentry (App., *infra,* 6a-7a). Finally, he noted that there is no constitutional impediment to barring aliens from collaterally attacking the validity of their deportation proceedings in prosecutions under Section 1326 (App., *infra,* 7a).

ARGUMENT

The court of appeals incorrectly decided a question of great importance to the administration of the immigration laws. As the court of appeals acknowledged (App., *infra,* 3a) there is a conflict in the circuits on the issue whether a defendant in a prosecution under Section 1326 may collaterally attack the validity of the underlying deportation order. The issue is important because the government brings a large number of prosecutions under Section 1326.[5] Permitting defendants in unlawful reentry cases to attack the validity of their deportation proceedings greatly complicates those prosecutions, which otherwise involve only the simple questions whether the defendant was deported and whether he was subsequently found in the United States without the Attorney General's permission. As the dissenting judge in the court of appeals stated, Congress has provided three "sole and exclusive" procedures for obtaining judicial review of the validity of a deportation proceeding, and review as part of a Section

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[5] The Immigration and Naturalization Service informs us that during 1985 United States Attorneys authorized 1,185 prosecutions under Section 1326.

1326 prosecution is not one of the three enumerated procedures. In these circumstances review of this recurring question is plainly warranted.[6]

1. There is a clear conflict in the circuits, as the court of appeals acknowledged (App., *infra,* 3a). The Second (*Petrella, supra,* note 3, 707 F.2d at 66-67), Fifth (*Gonzalez-Parra, supra* note 3, 438 F.2d at 697), and Tenth (*Arriaga-Ramirez, supra* note 3, 325 F.2d at 859) Circuits have held that collateral attacks on the validity of deportation hearings are not permitted in Section 1326 prosecutions. The Eighth Circuit in this case, along with the Ninth Circuit (*Gasca-Kraft, supra* note 3, 522 F.2d at 152), have permitted collateral attacks. The Third Circuit permits collateral attacks in a least some circumstances (*Bowles, supra* note 3, 331 F.2d at 750). And the Seventh Circuit has permitted limited collateral attacks on the underlying deportation proceedings (*Rosal-Aguilar, supra* note 3, 652 F.2d at 723). The conflict in the circuits is therefore now well established, and without this Court's intervention, it is likely to persist.[7]

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[6] We have not presented for this Court's review the question whether the district court erred in concluding that the deportation proceeding in this case was unlawful. We note nevertheless that the district court found only a "technical" violation of the required procedures (App., *infra,* 22a). Furthermore, contrary to the district court's conclusion, it is highly unlikely that respondents were prejudiced as a result of the immigration judge's failure to explore the possibility that they might qualify for suspension of deportation. Suspension of deportation is an extraordinary remedy that is seldom granted, and its requirements have been strictly applied. See *INS* v. *Rios-Pineda,* No. 83-2032 (May 13, 1985); *INS* v. *Phinpathya,* 464 U.S. 183 (1984); *INS* v. *Jong Ha Wang,* 450 U.S. 139 (1981).

[7] We suggested in our opposition to the petition for a writ of certiorari in *Petrella* (at 7) that the conflict might not persist because the circuits permitting collateral attack might be persuaded to change their position in light of this Court's decision in *Lewis.* The Court denied the petition in *Petrella* over two dissents. *Petrella* v. *United States,* cert. denied, 464 U.S. 921 (1983) (White & Blackmun, JJ.). It is now clear that the conflict has persisted in spite of *Lewis.* The Ninth

2. On the merits, we submit that the court of appeals erred in permitting respondents to attack the validity of their deportation hearing in a prosecution for reentering the United States. Section 1326 provides that it is a crime for an alien to reenter the United States without the permission of the Attorney General after having been deported. The statute says nothing about the validity of the order that authorized the alien's prior deportation. There is therefore nothing in the language of Section 1326 to suggest that the validity of the prior deportation proceeding is, in effect, an element of the offense.

The provision of the Immigration and Nationality Act that deals expressly with judicial review of deportation orders (8 U.S.C. 1105a) provides strong support for the view that Congress did not intend to permit collateral attacks on the validity of deportation hearings in Section 1326 prosecutions. Section 1105a(a) provides that the procedure under which orders of federal agencies are reviewed in the federal courts of appeals (see 28 U.S.C. 2341 *et seq.*) is the "sole and exclusive procedure for * * * judicial review of all final orders of deportation." Thus, an alien may obtain review of a deportation order by exhausting his administrative remedies and filing a petition for review within six months of the date of the final deportation order (8 U.S.C. 1105a(a)(1)).

Section 1105a provides only two exceptions to the rule that review of the deportation order in the court of appeals is the sole and exclusive method judicial review. The first exception, found in Section 1105a(a)(9), provides that an alien "held in custody pursuant to an order of deportation may obtain judicial review * * * by habeas corpus pro-

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Circuit has recently reaffirmed its rule permitting collateral challenges to deportation proceedings (*United States* v. *Nicholas-Armenta*, 763 F.2d 1089, 1090 (1985)), and the Eighth Circuit in this case has adopted the Ninth Circuit's approach.

ceedings." The second exception, which is codified in Section 1105a(a)(6), provides that an alien who fails to depart may collaterally attack the validity of his deportation order in a prosecution under 8 U.S.C. 1252(d) for failure to depart after being ordered to do so. That exception makes it clear that Congress knew how to permit collateral attacks on the validity of deportation proceedings in criminal prosecutions. The fact that Congress did not provide an exception in the case of prosecutions for reentering the United States in violation of Section 1326, while it did in the case of prosecutions for failure to depart in violation of Section 1252(d), makes it all the more clear that it did not intend to permit collateral attacks in unlawful reentry cases.[8]

Contrary to the suggestion of the court of appeals (App., *infra,* 4a), prohibiting collateral attacks on deportation proceedings in Section 1326 prosecutions does not violate due process. In *Lewis,* the Court held that Congress could constitutionally focus "on the mere fact of conviction, regardless of the validity of the conviction, as a way to keep firearms away from potentially dangerous persons" (445 U.S. at 67). The Court noted that a convicted felon could "challenge the validity of a prior conviction, or otherwise remove his disability, before obtaining a firearm" (*ibid.*). In the case of deported aliens, Congress could rationally determine to limit the elements of the criminal offense to (1) a reentry into the United States, (2) without the Attorney General's permission, (3) by a previously deported alien. Like a convicted felon, an alien who is subject to a deportation order has alternative

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[8] Another portion of the judicial review statute (8 U.S.C. 1105a(c)) provides that an "order of deportation or of exclusion shall not be reviewed by any court if the alien.* * * has departed from the United States after the issuance of the order." It is difficult to see how Congress could have made it any clearer that it did not intend to permit collateral attacks on the validity of deportation proceedings except where such challenges were specifically authorized.

avenues for obtaining relief. He may challenge the validity of the deportation order in the ways enumerated in Section 1105a or he may attempt to obtain the Attorney General's permission before reentering the United States.

The statutory scheme is not unconstitutional on the ground that the primary method for challenging deportation orders—through review by a court of appeals of a final order of deportation (8 U.S.C. 1105a(a))—is a civil proceeding. In *Yakus* v. *United States,* 321 U.S. 414, 443-446 (1944), the Court upheld the Emergency Price Control Act against a similar constitutional challenge. The Act provided that a person subject to a maximum price regulation could challenge its validity only through a civil proceeding; a defendant could not challenge the validity of a maximum price regulation in a criminal proceeding for violating the regulation. The Court found no constitutional infirmity in that statutory scheme. In reaching that conclusion, the Court stated (321 U.S. at 444) that there is "no principle of law or provision of the Constitution which precludes Congress from making criminal the violation of an administration regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity."

Despite the holding in *Yakus,* the dissenters in *Spector* contended that the Constitution requires that an alien be shown to be deportable before he can be convicted of unlawfully failing to depart (343 U.S. at 177-180). Some of their concerns, however, were addressed by Congress when it subsequently enacted Section 1105a. First, at the time *Spector* was decided it was not clear that deportation orders could be subjected to judicial review (see 343 U.S. at 179 (Jackson & Frankfurter, JJ., dissenting)); Section 1105a(a) now makes it clear that deportation orders are reviewable by the courts of appeals. Second, the dissenters in *Spector* were concerned that some aliens ordered deported might not find a country that would accept them

(343 U.S. at 179-180) (Jackson & Frankfurter, JJ.)); because Section 1105a(a)(6) authorizes judicial review of the validity of a deportation order in the case of an alien who is prosecuted for failing to leave the country, an alien who cannot find a country that will accept him can obtain judicial review of the validity of the deportation order even if he has not pursued an appeal under Section 1105a(a).

There is, therefore, no constitutional principle requiring that "a deported alien who fails to invoke the procedures of 8 U.S.C. § 1105a be permitted to contest the factual basis for the deportation order after he has reentered the country" (*Gonzalez-Parra,* 438 F.2d at 699). For that reason, there is no need to avoid a difficult constitutional issue by construing Section 1326 to require the government to prove as an element of the crime of unlawful reentry that the defendant was "lawfully" deported.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1986

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1436

UNITED STATES OF AMERICA, APPELLANT,

VS.

JOSE MENDOZA-LOPEZ, APPELLEE.

No. 85-1437

UNITED STATES OF AMERICA, APPELLANT,

VS.

ANGEL LANDEROS-QUINONES, APPELLEE.

Appeals from the United States District Court for the District of Nebraska.

Submitted: September 11, 1985

Filed: December 31, 1985

Before HEANEY, JOHN R. GIBSON and FAGG, Circuit Judges.

HEANEY, Circuit Judge.

The United States appeals from the dismissal of the indictments against two illegal immigrants in this 8 U.S.C. § 1326 proceeding. For the reasons set forth below, we affirm.

BACKGROUND

Jose Mendoza-Lopez and Angel Landeros-Quinones were illegal immigrants from Mexico. They lived in the United States for more than seven years when they were picked up by agents of the Immigration and Naturalization Service in Nebraska. After a hearing at which they were not represented by counsel, they were deported. Six weeks after deportation, they were arrested in Lincoln, Nebraska, on charges of re-entry without authorization under 8 U.S.C. § 1326.

At trial, defendants moved to suppress evidence of their deportation. The government argued that the motion amounted to an impermissible collateral attack on deportation orders, and that, nevertheless, the defendants' constitutional rights had not been violated. The district court concluded that defendants could attack the deportation procedure and that the lack of legal counsel at the deportation hearing, combined with the defendants' inability to understand the proceedings, violated the concept of fundamental fairness. The unlawful presence charges were dismissed. On appeal, the government argues that the trial court erred by permitting the defendants to collaterally attack their deportation orders and, in any event, that the defendants were afforded due process at the deportation hearing.

DISCUSSION

The Supreme Court has expressly reserved the question of whether a defendant can collaterally attack a deportation order. *United States v. Spector*, 343 U.S. 169 (1952).[1]

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[1] The government argues that the Supreme Court's intent to prohibit collateral attacks in section 1326 proceedings was made apparent in *Lewis v. United States*, 445 U.S. 55 (1980). In *Lewis*, the Court held that the defendant, in a prosecution for possession of a firearm by a felon, could not collaterally attack his prior conviction, even though

The United States Circuit Courts which have addressed this issue are split. The more restrictive view is found in the Tenth, Fifth and Second Circuits. *See Arriaga-Ramirez v. United States*, 325 F.2d 857 (10th Cir. 1963); *United States v. Gonzalez-Parra*, 438 F.2d 694 (5th Cir. 1971); *United States v. Petrella*, 707 F.2d 64 (2d Cir. 1983). These courts reason that since Congress has provided three separate avenues for appeals of administrative deportation findings, *see* 8 U.S.C. § 1105a, it intended to foreclose the possibility of collateral attack on such orders in section 1326 prosecutions. The Ninth, Third and Seventh Circuits, on the other hand, permit collateral attacks on deportation orders. *See United States v. Bowles*, 331 F.2d 742 (3rd Cir. 1964); *United States v. Gasca-Kraft*, 522 F.2d 149 (9th Cir. 1975); *United States v. Rosal-Aguilar*, 652 F.2d 721 (7th Cir. 1981). These courts reason that a material element of the offense prohibited by 8 U.S.C. § 1326 is a "lawful" deportation and that, therefore, when prosecuting a section 1326 proceeding, the government must prove beyond a reasonable doubt that the defendant illegally entered the United States after being deported according to law. *Gasca-Kraft*, 522 F.2d at 152. Under this reasoning, the defendant must be able to contest the lawfulness of the deportation in the section

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the court assumed that the conviction was the result of an uncounseled guilty plea. The Court relied upon the language of the statute itself, noting that the prior conviction was not required to be "valid," and the statutory history, which disclosed an intent by Congress to enact "a sweeping prophylaxis, in simple terms, against misuse of firearms." *Id.*, 445 U.S. at 63.

Lewis is not controlling. In *Lewis* the prior decision was judicial, not administrative. Moreover, while it can be said that Congress had a legitimate interest in prohibiting the possession of firearms by those whose brushes with the law resulted only in invalid convictions, it cannot likewise be said that Congress intended to expel from this country all aliens, even those who have a legitimate right to be here.

1326 proceeding. We agree with this rationale. Allowing a pretrial review of the underlying deportation to examine whether due process was provided insures fundamental fairness to the rights of the criminal defendant. Accordingly, we conclude that defendants in section 1326 prosecutions may collaterally attack their previous deportation orders on the ground that they were not accorded due process at the deportation hearing.

The next question is whether the district court erred in finding a due process violation. Our review of the record reveals that the district court's conclusion is not clearly erroneous.

Both defendants had been continuously present in the United States for a period exceeding seven years at the time of the deportation hearing. They were therefore eligible for suspension of deportation. The Immigration Law Judge (ILJ) did not adequately inform the defendants about this alternative relief, as is required by 8 C.F.R. § 242.17(2). The defendants did not understand the consequences of the choices that they were forced to make. Had they been fully aware of such consequences, there is a substantial likelihood that the result of the hearing would have been "materially affected." Therefore, the defendants demonstrated prejudice from the ILJ's failure to fully comply with the provisions of 8 C.F.R. § 242.17. Because the defendants did not fully understand the proceedings, the hearing was fundamentally unfair, and the deportation order was obtained unlawfully. Thus, it cannot stand as a material element forming the basis of the charges against the defendants. The indictments were properly dismissed. Accordingly, we affirm.

FAGG, Circuit Judge, dissenting.

I respectfully disagree with the court's determination that an alien can attack collaterally a previous deportation order as a defense to a prosecution under 8 U.S.C. § 1326.

I would reverse the order of the district court dismissing the indictment against Mendoza-Lopez and Landeros-Quinones. In my view, aliens may not challenge deportation orders in section 1326 prosecutions because the "sole and exclusive procedure" for obtaining judicial review of deportation orders is embodied in the comprehensive review provisions of 8 U.S.C. § 1105(a). Although the court gives short shrift to *Lewis v. United States*, 445 U.S. 55 (1980), *ante* at 3, I believe the *Lewis* analysis is indeed supportive of the government's view.

The starting point in the interpretation of any statute is the language of the statute itself. *Lewis*, 445 U.S. at 60. Section 1326 clearly speaks only of the fact and not the quality of a previous deportation. "Any alien who—(1) has been arrested and deported * * * and thereafter (2) enters * * * the United States [without the consent of the Attorney General] shall be guilty of a felony." 8 U.S.C. § 1326. "The lack of any express reference to the validity of the deportation or of the arrest indicates that the statute seeks to punish the unauthorized reentry of an alien previously deported, regardless of whether the deportation was 'lawful.' " *United States v. Petrella*, 707 F.2d 64, 66 (2d Cir.), *cert. denied*, 464 U.S. 921 (1983). *Cf. Lewis*, 455 U.S. at 60 ("No modifier is present, and nothing suggests any restriction on the scope of the term [deported].")

Despite the plain language of the statute, the court today adopts the position that a *lawful* deportation is a material element of a section 1326 offense. Although an ambigous criminal statute should be resolved in favor of lenity, *see Rewis v. United States*, 401 U.S. 808, 812 (1971), in the interpretation of an unambiguous statute "any principle of lenity * * * has no application." *Lewis*, 445 U.S. at 65.

The legislative history of section 1326 is barren of any suggestion that Congress was willing to allow a defendant to question the validity of a prior deportation order in a

section 1326 prosecution. *See* H.R. Rep. No. 1365, 82d Cong., 2d Sess., *reprinted in* 1952 U.S. Code Cong. & Ad. News 1653, 1724. In addition, my reading of section 1105a and its legislative history leads me to the conclusion that Congress intended to bar collateral attacks on deportation orders in prosecutions under 8 U.S.C. § 1326. Section 1105a was enacted in response to congressional concern over the inability to enforce effectively the deportation provisions of the immigration laws due to frivolous and repetitive attacks on deportation orders. *See* H.R. Rep. No. 1086, 89th Cong., 1st Sess., *reprinted in* 1961 U.S. Code Cong. & Ad. News 2950, 2967. "The purpose of section 5 [of the amendment] is to create a single, separate, statutory form of judicial review of administrative orders for the deportation and exclusion of aliens from the United States, by adding a new section [1105a] to the Immigration and Nationality Act." *Id.* at 2966.

Section 1105a expressly supplies the "sole and exclusive" procedures available to aliens who have not yet departed from the United States "to obtain judicial review of all final orders of deportation." 8 U.S.C. § 1105(a). Under the statutory framework an alien may obtain judicial review in several ways. *Cf. Lewis*, 455 U.S. at 64 ("[I]t is important to note that an [alien ordered deported] is not without relief."). First, an alien may obtain civil review of a deportation order in the federal courts of appeals. 8 U.S.C. § 1105a(a). Second, an alien in custody may obtain habeas corpus review. 8 U.S.C. § 1105a(a)(9). Finally, aliens prosecuted under 8 U.S.C. § 1252(d) (violation of supervisory regulations) or 8 U.S.C. § 1252(e) (willful failure of an alien to depart) may challenge the validity of deportation orders in pretrial motions. 8 U.S.C. § 1105a(a)(6).

After reviewing the comprehensive scheme for judicial review that is available to aliens under section 1105a, the Second Circuit and the Fifth Circuit have concluded that

aliens are not permitted to challenge deportation orders during prosecutions for unlawful reentry under section 1326. *See United States v. Petrella*, 707 F.2d at 66 ("[N]either the statute on its face nor the statutory scheme for review of deportation orders authorizes a challenge to the original deportation. We conclude, therefore, that Congress intended to bar collateral attacks in § 1326 prosecutions."); *United States v. Gonzalez-Parra*, 438 F.2d 694, 697 (5th Cir.) ("We think it clear that Congress intended to bar collateral attacks on deportation orders in prosecutions under 8 U.S.C. § 1326."), *cert. denied*, 402 U.S. 1010 (1971).

Nor do I see any constitutional impediment to the view expressed in this dissent. First, the focus of section 1326 on the mere fact of deportation and unlawful reentry is rational in light of the congressional purpose to streamline judicial review of deportation orders. Second, the statutory scheme does provide a comprehensive, albeit exclusive, format for judicial review of deportation orders. Therefore, an alien subject to deportation has an opportunity outside of section 1326 to challenge the validity of the order. *See Lewis*, 455 U.S. at 65-67; *see also United States v. De La Cruz-Sepulveda*, 656 F.2d 1129, 1132 (5th Cir. 1981).

Because section 1105a provides the "sole and exclusive" method for obtaining judicial review of deportation orders, I would hold that an alien may not challenge a deportation order in his section 1326 prosecution. Therefore, I would reverse the district court's dismissal of the indictments against Mendoza-Lopez and Landeros-Quinones.

APPENDIX B

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CR85-L-06

UNITED STATES OF AMERICA, PLAINTIFF,

v.

ANGEL LANDEROS-QUINONES, DEFENDANT.

CR85-L-07

UNITED STATES OF AMERICA, PLAINTIFF,

v.

JOSE MENDOZA-LOPEZ, DEFENDANT.

[Filed Feb. 28, 1985]

MEMORANDUM

Defendants in these criminal prosecutions have filed motions for judicial review and to dismiss the indictments against them, as well as motions to suppress evidence, all stemming from the prior administrative adjudications of the Immigration and Naturalization Service (INS), finding the defendants deportable under the nation's immigration laws, and in fact resulting in the defendants' deportation. Defendants contend that this court should allow the defendants to collaterally attack their prior administrative adjudications and the procedures utilized by INS in reaching the deportation decision, because they are material elements of the offense with which the defendants now stand charged, violation of Title 8 U.S.C. § 1326,

commonly referred to as illegal entry following deportation.

Each of the defendants was arrested at a separate location on October 23, 1984 by agents of INS upon a belief that each was an alien in this country illegally. Both defendants were transported to Denver, Colorado on October 30, 1984, on which date a deportation hearing was held before an Immigration Judge. The hearing was held on a group basis, there being thirteen persons appearing before the Immigration Judge at the same time, including these defendants. Warrants of Deportation were issued on October 31, 1984, ordering each of the defendants deported. The warrants were executed November 1, 1984. The parties appear to have stipulated that each defendant was served, at the time of his deportation, with an INS form I-294 (although the copy of the form for defendant Mendoza-Lopez is not attached to the stipulation), by which each defendant was advised in both Spanish and English that his return to the United States following his deportation, without permission, would constitute a felony offense. On December 12, 1984 both defendants were again arrested at separate locations in Lincoln, Nebraska. The defendants were thereafter indicted by the grand jury sitting in this district upon charges of violating 8 U.S.C. § 1326. That statute provides:

> Any alien who—
>
> (1) has been arrested and deported or excluded and deported, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in the United States, unless (A) prior to his reembarkation at a place outside of the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for

> admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act.
>
> shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by fine of not more than $1,000, or both.

Thus, the defendants' motions raise two issues; first, whether collateral attack of the administrative decisions of deportability should be allowed in a subsequent criminal prosecution under 8 U.S.C. § 1326; and second, if so, whether the deportation orders entered in each of these cases can properly form the basis of the offenses with which these defendants now stand charged.

The Supreme Court of the United States, in *United States* v. *Spector,* 343 U.S. 169 (1952), has declined to consider the collateral attack issue. Although it was raised in that case, a criminal prosecution for an alien's failure to take steps to depart the country, having been ordered to do so, the court decided the case on other grounds, and did not consider the collateral attack issue. Dissenting, Justices Jackson and Frankfurter sounded the theme later heard in circuit courts considering the issue:

> This Act creates a crime also based on unlawful residence in the United States. The crime consists of two elements: one, an outstanding order for deportation of an alien; the other, the alien's willful failure to leave the country or take specified steps toward departure. The Act does not permit the court which tries him for this crime to pass on the illegality of his presence. Production of an outstanding administrative order for his deportation becomes conclusive evidence of his unlawful presence and a consequent duty to take himself out of the country, and no in-

quiry into the correctness or validity of the order is permitted.

The subtlety of the present Act consists of severing the issue of unlawful presence for administrative determination which then becomes conclusive upon the criminal trial court. We must not forget that, while the alien is not constitutionally protected against deportation by administrative process, he stands on an equal constitutional footing with the citizen when he is charged with crime. If Congress can subdivide a charge against an alien and avoid jury trial by submitting the vital and controversial part of it to administrative decision, it can do so in the prosecution of a citizen. And if vital elements of a crime can be established in the manner here attempted, the way would be open to effective subversion of what we have thought to be one of the most effective constitutional safeguards of all men's freedom.

* * *

The adjudication that an alien has been guilty of conduct subjecting him to deportation is not made by procedures constitutional for judgment of crime. It is not made either by a jury trial or a court decision. All that is required by statute is a hearing before an administrative officer and that may be before one who acts both as the alien's judge and prosecutor. The finding that the alien is guilty of conduct subjecting him to deportation does not require proof beyond reasonable doubt but may be made on mere preponderance of evidence. If the determination of deportability is subject to review under § 10 of the Administrative Procedure Act, . . ., an evidentiary attack raises only the question whether on the record as a whole there is substantial evidence in support of

the order. *Universal Camera Corp. v. Labor Board*, 340 U.S. 474.

* * *

343 U.S. at 177-179 (Jackson, J., dissenting) (footnotes omitted).

The courts of appeals have considered the issue of whether a defendant in a criminal prosecution under 8 U.S.C. § 1326 should be permitted to collaterally attack his earlier deportation order.[1] The more restrictive views are found in cases decided by the Tenth, Fifth, and Second Circuits. *See United States v. Petrella,* 707 F.2d 64 (2nd Cir. 1983); *United States v. De La Cruz Sepulveda*, 656 F.2d 1129 (5th Cir. 1981); *United States v. Gonzalez-Parra*, 438 F.2d 694 (5th Cir. 1971), *cert. denied* 402 U.S. 1010 (1971); *Arriaga-Ramirez v. United States,* 325 F.2d 857 (10th Cir. 1963). In *Gonzalez-Parra, supra*, the court analyzed the congressional scheme set forth in the Immigration and Nationality Act, concluding that by providing three separate avenues for appeals of administrative deportation findings, congress intended to foreclose the possibility of collateral attack on such orders in § 1326 prosecutions. In *Petrella, supra,* the Second Circuit followed the reasoning of the Fifth Circuit in *Gonzalez-Parra*, and further rejected the idea that the court should inquire whether the deportation order was "lawful," analogizing the situation to a charge under 18 U.S.C. § 751 for escape from imprisonment brought against a defendant serving a sentence claimed to be invalid. 707 F.2d at 66, n.2. I note that in both *Petrella* and *Gonzalez-Parra*, the defendants had been represented by counsel at the prior deportation proceedings. This is not clear in *Arriaga-Ramirez.* In that case the Tenth Circuit Court of Appeals rejected the possibility of collateral attack in a

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[1] See, "Collaterally Attacking Deportation Orders in Criminal Prosecutions for Illegal Reenry under Section 276 of the Immigration and Nationality Act of 1952," 56 Notre Dame Lawyer 677 (April 1981).

prosecution under 8 U.S.C. § 1326, without discussion, relying upon two prior cases precluding such attacks in civil, redeportation proceedings.[2]

Other circuit courts have permitted defendants in § 1326 prosecutions to attack, to varying degrees, the underlying deportation orders. In *United States v. Rosal-Aguilar*, 652 F.2d 721 (7th Cir. 1981) the circuit court affirmed the denial of a *de novo* hearing on the merits of the deportation, but approved the district court's review of the deportation proceedings on the proposition that "the government must prove the underlying deportation to have been based on a valid legal predicate and obtained according to law." 652 F.2d at 723 (citations omitted). In *United States v. Bowles*, 331 F.2d 742 (3rd Cir. 1964) the circuit court permitted collateral attacks on underlying deportation orders insofar as to examine both the factual and the legal bases for such orders. 331 F.2d at 750.

The most extensive case law in this area has emanated from the Ninth Circuit. There, in *United States v. Gasca-Kraft*, 522 F.2d 149 (9th Cir. 1975), in a prosecution under 8 U.S.C. § 1326, the court held that a material element of the offense therein defined is a *lawful* deportation. 522 F.2d at 152. The court relied upon *Pena-Cabanillas v. United States*, 394 F.2d 785 (9th Cir. 1968) (which, in turn, relied upon *United States v. Bowles, supra*), for the proposition that the government must prove that the accused entered the United States "after being deported according to law." 331 F.2d at 750. *See also United States v. Heikkinen,* 221 F.2d 890, 892 (7th Cir. 1955). In *Gasca-Kraft*, however, the defendant failed to show that he was entitled to appointed counsel in his defense at the deportation hearing since it was a civil proceeding, thus failing in

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[2] *United States ex rel Rubio v. Jordan*, 190 F.2d 573 (7th Cir. 1951); *United States ex rel Bartsch v. Watkins,* 175 F.2d 245 (2nd Cir. 1949).

his attempt to demonstrate that the deportation order was unlawful. Later, in *Mendez v. Immigration and Naturalization Service*, 563 F.2d 956 (9th Cir. 1977), a civil appeal of a deportation order, that circuit rejected the INS contentions that the alien's appeal was barred by 8 U.S.C. § 1105(a) [3] and 8 U.S.C. § 1101(g).[4] The court held that the statutes' use of the term "departed" implied a requirement that the departure not be in contravention of procedural due process, and that it be a "legally executed" departure when effected by the government. 563 F.2d at 958. The Ninth Circuit thus rejected the reasoning found persuasive by the Fifth and Second Circuits, *see Petrella, supra; Gonzales-Parra, supra.* This position was reaffirmed in *United States v. Barraza-Leon*, 575 F.2d 218 (9th Cir. 1978), and was expanded upon by the court in *United States v. Calderon-Medina*, 591 F.2d 529 (1979), following remand, 617 F.2d 529 (9th Cir. 1980), in which that court held that the violation of a regulation of the INS may invalidate a deportation proceeding if the regulation serves a purpose of benefit to the alien, and if its violation prejudiced interests of the alien which were so protected. 591 F.2d at 531.

The Eighth Circuit Court of Appeals has not spoken directly to this issue. In *Hernandez-Uribe v. United States,* 515 F.2d 20 (8th Cir. 1975), *cert. denied* 423 U.S. 1057

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[3] 8 U.S.C. § 1105(a) states in part: "(c) An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order.* * *"

[4] Quoting 8 U.S.C. § 1101(g). "For the purposes of this chapter any alien ordered deported (whether before or after the enactment of this chapter) who has left the United States, shall be considered to have been deported in pursuance of law, irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed."

(1976), the defendant challenged the use of collateral estoppel against him by the government's showing his previous two convictions under 8 U.S.C. § 1326, as precluding his opportunity to challenge the instruction to the jury that the defendant was in fact an alien as of the date of this guilty plea to one of the previous charges. The court relied upon the reasoning of *Pena-Cabanillas, supra,* in approving the use of collateral estoppel in this circumstance. In doing so, it quoted the language of *United States v. Rangel-Perez*, 179 F.Supp. 619 (S.D. Cal. 1959), which had also been quoted by the *Pena-Cabanillas* panel. That language, while rejecting the proposition that a defendant could relitigate the issue of alienage established in a previous criminal proceeding, included the following:

> Of course the defendant is entitled to have tried anew each time the facts as to his entry and its justification on other grounds (see 8 U.S.C.A. § 1326) as well as any change of nationality status since the prior adjudication. And it is equally beyond question that the accused is always entitled to have any prior proceedings carefully examined in order to determine surely whether a prior adjudication of alienage was made after a full and adequate hearing, and was essential to a determination of the case.

515 F.2d at 22, quoting 394 F.2d at 787-788. The Eighth Circuit went on to comment that the defendant's guilty plea, by which he waived his right to a trial, also waived his

> opportunity to contest the determination of alienage in that case on the same basis as alleged here. He there had a right to a jury trial in which he could have presented any evidence he had pertaining to the place of his birth.

515 F.2d at 22. It is unclear whether this language is intended to be a recitation of the Ninth Circuit law as

discussed above, or an indication that in the Eighth Circuit defendants in § 1326 prosecutions have a right to a *de novo* review of the factual basis underlying the original deportation order. It appears to me that the approved quotation in *Hernandez-Uribe* indicates in this circuit a posture to allow at least some degree of collateral attack upon prior deportation orders. To determine whether the prior deportability adjudication was after "a full and adequate hearing" requires examination of whether applicable constitutional, statutory, and regulatory procedures were followed.[5]

The government argues that the case of *Lewis v. United States*, 445 U.S. 55 (1980) forecloses a collateral attack on prior administrative deportation decisions. In *Lewis* the Court held that a defendant in a prosecution for possession of a firearm by a felon, could not collaterally attack his prior conviction, even though the court assumed that the conviction was the result of an uncounseled guilty plea. The Court relied upon the language of the statute itself, noting that the prior conviction was not required to be "valid," and the statutory history, which disclosed an intent by Congress to enact "a sweeping prophylaxis, in simple terms, against misuse of firearms." 445 U.S. at 63. The defendant's challenge on equal protection grounds was also rejected, the Court reasoning that Congress had

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[5] *See also United States v. Cabrera-Quintero*, 650 F.2d 942 (8th Cir. 1981) where the Eighth Circuit rejected a challenge under 28 U.S.C. § 2255 to a § 1326 conviction on the basis of an allegedly invalid prior deportation order:

> We hold that the validity of the original deportation is not a matter that is cognizable under § 2255. . . . Whether the validity of the original deportation could have been raised on direct appeal is another question."

650 F.2d at 843.

made a rational choice in deciding to prevent all felons, even those whose convictions were invalid, from possessing firearms.

I do not find *Lewis* controlling in this instance for essentially three reasons. First, the obvious difference in context is significant. While it might be said that Congress has been alarmed by this nation's inability to control its borders, there is no indication that the degree of that alarm matches that which caused Congress to enact the Omnibus Crime Control and Safe Streets Act of 1968, the Act involved in the *Lewis* case. Second, the prior decision here is administrative, not judicial. It is important to note that even while the *Lewis* Court assumed that the defendant's prior conviction was uncounseled it took note of the fact that the defendant's legal disability followed a criminal conviction, that is, a judicial proceeding. The court also noted that the Omnibus Act also prohibited possession of firearms even by persons who were under indictment (18 U.S.C. § 922(h)(1)), thus raising the implication that the disability applied determination of probable cause that the individual had committed a felony. Third, and most important, there is a striking difference in the interests at stake. While it might be said, as did the Supreme Court in *Lewis*, that Congress had a legitimate interest in prohibiting the possession of firearms by those whose brushes with the criminal justice system resulted only in invalid convictions, it cannot likewise be said that Congress intended to expel from this country all aliens, even those who have a legitimate right to be here. These differences appear to me to override any similarities between *Lewis* and the present matter, and I have found no authority, and have been cited to none, which applies *Lewis* in this context.

I find the reasoning of the Third, Seventh, and Ninth Circuits to be persuasive, at least insofar as the reasoning allows defendants in § 1326 prosecutions to challenge, on

constitutional, statutory and regulatory grounds, the procedures utilized in their previous deportation adjudications, and to allow such challenges by way of judicial review of the proceedings, prior to the criminal trial. A trial *de novo* of deportability issues does not appear necessary or appropriate. The factual circumstances in these cases—actual deportation of unrepresented aliens only two days following the deportation hearing—further demand that the court examine the defendants' claims.

For these reasons I conclude that the defendants in these § 1326 prosecutions may collaterally attack their previous deportation orders, at least to the extent of raising the grounds set forth in their motions.

II

The defendants claim that they were prejudicially denied due process in their deportation hearings by the failure of the Immigration Law Judge to inform them adequately of their right to retained counsel at the hearing, resulting in their unintelligently waiving that right; and further, that they were denied due process by the Immigration Law Judge's ordering deportation when they were eligible for "suspension of deportation" under 8 U.S.C. § 1254.

Although deportation proceedings are civil and thus not subject to all procedural safeguards accompanying criminal trials, *Whetstone v. INS,* 561 F.2d 1303, 1306 (9th Cir. 1977), such proceedings nevertheless must be conducted in accordance with due process standards. *Nee Hao Wong v. INS,* 550 F.2d 521, 523 (9th Cir. 1977). While this standard does not require the appointment of counsel in deportation proceedings, *United States v. Gasca-Kraft, supra,* 8 U.S.C. § 1252(b)(2) requires that the alien in a deportation proceeding be advised of his right to counsel at no expense to the government, and the manner of obtaining counsel or notifying the alien of his

right to counsel at no expense to the government, and the manner of obtaining counsel or notifying the alien of his right to obtain counsel has been regarded as fundamental, a denial of which is inherently prejudicial. *See e.g. Castaneda-Delgado v. Immigration and Naturalization Service,* 525 F.2d 1295 (7th Cir. 1975); *see also Partible v. INS,* 600 F.2d 1094 (5th Cir. 1979).

The defendants contend that their due process rights were violated when the Immigration Law Judge failed to inform them adequately of their right to counsel. I have reviewed the tape recording of the hearing held before the Immigration Law Judge on October 30, 1984. In addition, I have compared the hearing tape with the unofficial transcript provided by defense counsel. At the commencement of the hearing the Immigration Law Judge inquired of the thirteen aliens present at the hearing whether they had received a list of free legal services available. Initially, all thirteen indicated that they had received such a list, but later five of them indicated they had not received such a list of available legal services in Colorado. The tape indicates that such lists were immediately given to those five (unspecified) aliens. Later, the court advised the aliens present that they were entitled to have representation at the hearing by an attorney at law of their own choice, or by any other person or organization that is authorized and qualified to practice before the immigration court, or, that they could represent themselves at the hearing. As a group, the thirteen respondents indicated that they understood this right, that none of them had made arrangements for representation and that none of them wished to postpone the hearing in order to obtain counsel. The court then instructed the respondents that if any of them did not understand any of the proceedings, to raise their hands and their misunderstandings would be addressed so as to eliminate any confusion. Again, as a group, all indicated an understanding of that arrangement. Later all of the thirteen respondents were sworn and each, including these defendants, admitted each of the

allegations in the orders to show cause why they should not be deported (*see* filing 22).

There has been no showing made by either defendant that he did not understand that he had a right to counsel in these proceedings, albeit retained counsel of his own choosing. Nor is there any argument that either of them was prejudiced by the manner in which the Immigration Law Judge notified him of his right to retained counsel. I therefore conclude that the defendants have failed to demonstrate that their rights under the due process clause, or under the statutes, were violated by this factor standing alone.

Defendants also contend, however, that the Immigration Law Judge failed to advise them properly of their eligibility to apply for suspension of deportation, particularly when they were unrepresented, such that their waivers of that opportunity cannot be found to be knowing and intelligent thus violating their rights to due process. In this matter, the record is less clear.

In *Barraża-Leon, supra,* the Ninth Circuit Court of Appeals held that an Immigration Law Judge was not required by the applicable regulation[6] to inquire into the factual circumstances of the defendant's alleged eligibility for suspension of deportation, when the defendant's assertions of eligibility were not credible so as to make his eligibility "apparent" within the meaning of the regulation. In *Pargible, supra,* on the other hand, in a civil appeal from the Board of Immigration Appeals, the Fifth Circuit found that a waiver of counsel by an alien respondent was not understandingly made when she was not aware of the arguments that could have been made in her behalf, arguments which, the court concluded, might well have resulted in relief from deportation.

The record is clear that the Immigration Law Judge was aware of the fact that both defendants in this case had

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[6] 8 C.F.R. § 242.17(a).

been continuously present in the United States for a period exceeding seven years at the time of the deportation hearing. It is not at all clear, however, that his explanation of avenues of relief from deportation was understood by these defendants. For example, at one point the judge apparently addressed the wrong respondent regarding eligibility for suspension of deportation. At another point the judge did not answer one of the respondents' questions regarding bond and how that might affect application. Neither the unofficial transcript nor the tape indicates which of the defendants was making inquiry of the judge regarding the timing of such an application, and in response, the judge was not clear whether he would allow the defendants ten days or five days to make application for this relief. In addition, after Mr. Mendoza stated that he wanted to be a resident of the United States, the judge stated, "You what? You can apply for it [at which point the judge paused for laughter in the courtroom], but you have got to establish that you are eligible to get that classification." Shortly thereafter, Mr. Mendoza stated that he did not want to apply for the relief of suspension of deportation. Mr. Landeros questioned the judge about getting released on bond and voluntary departure in response to the judge's explanation concerning suspension of deportation; this discussion indicated a lack of understanding by Mr. Landeros of the whole idea of suspension of deportation.

The discussion with the two defendants here by the Immigration Law Judge in contrast with his discussion with two other of the respondents who requested consideration for voluntary departure as an alternative to deportation. The judge engaged each of them in an extensive period of questioning with the attorney for INS, to establish their eligibility for that relief, eventually granting it to one of them. Although at least defendant Mendoza stated explicitly that he was interested in suspension of deporta-

tion, no such inquiry was conducted with respect to that request. Regarding Mr. Landeros, although he did not actually state that he wished to apply for suspension of deportation, his earlier questioning of the judge indicates some interest in applying for some relief from deportation, and the record is sufficient to establish that Mr. Landeros did not fully understand the relief of suspension of deportation.

8 C.F.R. § 242.17(a) provides in part:

> The special inquiry officer shall inform the respondent of his *apparent eligibility* to apply for any of the benefits enumerated in this paragraph and shall afford him an opportunity to make application therefor during the hearing.

Other than *Barraza-Leon, supra*, I have found no case law interpreting this regulation. In this case, however, the record is clear that, technically at least, the Immigration Law Judge did comply with this requirement. Substantively however, it is clear that the purpose of the requirement is to afford respondents in deportation hearings an opportunity to understand their options and to make intelligent choices given the alternatives available to them. The tape recorded hearing is abundantly clear that neither of the defendants in this case was in a position to evaluate intelligently the remarks of the Immigration Law Judge as they pertained to "relief" from deportation. Their waivers of their opportunities to apply for suspension of deportation, therefore, cannot be found to be knowing and intelligent under the circumstances.

In addition to the above, the tape recording of the hearing indicates that the respondents in this joint hearing were offered at most only a few minutes to decide whether they wished to appeal the Immigration Law Judge's rulings in their respective cases, when he inquired of them whether they wished to accept his ruling, appeal his ruling, or reserve decision. Each of the thirteen respondents stated

that he accepted the judge's ruling. While, again, this may comply with the technical requirements of the applicable regulations, one is left, after listening to the tape recording, with the impression that the respondents' waivers of their appeal rights so quickly were not the result of considered judgments on their parts. Although these defendants have not raised that matter specifically, they have raised the question of "fundamental fairness" in the adjudicatory proceedings. In light of their claimed eligibility for suspension of deportation, discussed below, I find it inconceivable that they would so lightly waive their rights to appeal, and thus to the relief they now claim entitlement, if they had been fully apprised of the ramifications of such a choice.

As noted above, the government has the burden of proving that the antecedent deportation order issued in each of these cases was "lawful." Because of the deficiencies described above, I find that it was not.

That does not end the matter, however. The Ninth Circuit cases have held that the defendant has the burden of demonstrating prejudice resulting from the failure of INS to abide by applicable law. *United States* v. *Calderon-Medina, supra.*

It is doubtful that, had counsel appeared with either of these defendants, the Immigration Law Judge's finding of deportability would have been changed in any respect. Both of these defendants admitted the allegations in the respective orders to show cause issued against them, and there is nothing in the record, nor is it argued, that these findings were not correct.

The defendants attempt to demonstrate that they were prejudiced by the manner in which the deportation hearing was conducted by arguing that they were eligible for suspension of deportation, and by offering the affidavit of an attorney who has represented clients in such applications which states that in her opinion, these defendants

were "good candidates" for such relief, which would, if granted, result in their permanent resident status.

Aside from the obvious practical difficulties in attempting to perfect an appeal from a foreign country, the fact that the warrant of deportation was executed two days following the hearing, well within the ten-day appeal period normally granted (*see* 8 C.F.R. § 242.21), the deportation had other effects, as well. First, 8 U.S.C. § 1105a purports to preclude any appeal, once the alien has "departed" from the United States (*but see Mendez v. INS, supra*). Second, the defendants' deportation interrupted their prior continuous stay in the United States, so as to make them seemingly now ineligible for suspension of deportation. *See* 8 U.S.C. § 1254(a).

Neither of the defendants in this case has proved that he is, or was, eligible for a suspension of deportation prior to the actual deportations which took place on November 1, 1984. According to the Nagy affidavit, that information could not be known for some time after an application, which now appears to be foreclosed to these defendants. Her opinion, however, that these defendants "would have been good candidates for suspension of deportation and, in my opinion, any competent attorney would have advised them to week [sic] that relief," is unchallenged by the government. This situation is much like that pointed out by the defendants in the case of *Partible v. INS, supra,* where relief was granted the alien in a civil appeal.

In *United States v. Rangel-Gonzales,* 617 F.2d 529 (9th Cir. 1980), the court was faced with a defendant's attempt to show prejudice from the failure of the INS to abide by 8 C.F.R. § 242.2(e) in his prior deportation proceeding which formed the basis of his § 1326 prosecution, having earlier remanded that question to the district court for a special hearing. *Calderon-Medina, supra.* The court had earlier held that the regulation in question, which required the INS to advise the respondent of his right to consult

with Mexican Consular authorities, served a purpose beneficial to the alien but that it would invalidate the deportation only if the alien could show prejudice to interests protected by the regulation. 591 F.2d at 531. The court had ruled that such prejudice would be shown if the violation of the regulation "harmed the aliens' interest in such a way as to affect potentially the outcome of their deportation proceedings." 591 F.2d at 532. On appeal after remand the circuit court reversed the district court's refusal to dismiss the indictment, concluding that the defendant's affidavits were sufficient to find prejudice. Those affidavits sought to demonstrate that, had he been advised of the opportunity, the alien would have called the Mexican Consulate, who would, in turn, have assisted him in seeking help from friends or an attorney, and that with appropriate assistance from an attorney, he might have obtained voluntary departure rather than deportation. The court concluded that the defendant had shown "some likelihood" that the outcome of his deportation hearing would have been "materially affected" had the regulation been followed. 617 F.2d at 531.

The record in this case is less complete to be sure. Nevertheless, as discussed above, the tape recording of the deportation hearing itself demonstrates amply that these defendants did not understand the consequences of the choices that they were forced to make, and that had they been fully aware of such consequences, there is not only "some likelihood" but a substantial likelihood that the result of the hearing would have been "materially affected." I therefore conclude that the defendants have demonstrated prejudice from the failure of the Immigration Law Judge to fully comply with the provisions of 8 C.F.R. § 242.17.

Due process includes the concept of fundamental fairness. My review of the deportation proceedings in these cases leads me to the unhappy conclusion that even

though the Immigration Law Judge might have technically complied with the specific requirements in the regulations, his failure to overcome these defendants' lack of understanding about the proceedings, which is apparent from listening to the tape recording, totally undermined the reliability of the proceedings. I am left with the distinct impression that substantial justice was not done. I cannot, therefore, allow the deportation orders to stand as a material element forming the basis of charges against these defendants pursuant to 8 U.S.C. § 1326.

IT THEREFORE HEREBY IS ORDERED, the indictments in both of these cases are hereby dismissed.

Dated February 28, 1985.

BY THE COURT

/s/ WARREN K. URBOM

Warren K. Urbom
Chief Judge

APPENDIX C

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CR85-L-07

UNITED STATES OF AMERICA, PLAINTIFF,

v.

JOSE MENDOZA-LOPEZ, DEFENDANT.

ORDER OF DISMISSAL

In accordance with the accompanying memorandum, IT IS ORDERED that the indictment is dismissed. Dated February 28, 1985.

FOR THE COURT

/s/ WARREN K. URBOM
Warren K. Urbom
Chief Judge

APPENDIX D

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CR85-L-06

UNITED STATES OF AMERICA, PLAINTIFF,

v.

ANGEL LANDEROS-QUINONES, DEFENDANT.

ORDER OF DISMISSAL

In accordance with the accompanying memorandum, IT IS ORDERED that the indictment is dismissed. Dated February 28, 1985.

FOR THE COURT

/s/ WARREN K. URBOM

Warren K. Urbom
Chief Judge

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Nos. 85-1436/1437-NE

UNITED STATES OF AMERICA, APPELLANT,

vs.

JOSE MENDOZA-LOPEZ, APPELLEE.

Appeals from the United States District Court for the District of Nebraska.

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

March 18, 1986

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No. 85-2067

In The

Supreme Court of the United States

October Term, 1985

UNITED STATES OF AMERICA,

Petitioner,

v.

JOSE MENDOZA-LOPEZ AND
ANGEL LANDEROS-QUINONES,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant prosecuted under 8 U.S.C. 1326 for reentering the United States after having been deported may collaterally attack the validity of his deportation proceeding to show that the deportation order was not entered in accordance with the law.

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The attorney for the defendants/respondents respectfully requests that the writ of certiorari sought in this case be denied.

—o—

STATEMENT

1. Both defendants were apprehended in Lincoln, Neb. on October 23, 1984, by U.S. Immigration and Naturalization Service agents (INS agents). The defendants were processed in Omaha, Neb., some 60 miles from Lincoln. After processing, they were flown 500 miles to Denver, Col. for detention prior to deportation proceedings. In a joint hearing on October 30, 1984, defendants and eleven other Mexicans were found deportable. None of the respondents were represented by counsel. At the hearing, both defendants requested that the Immigration Law Judge (ILJ) provide relief from the deportation order. Such relief was premised on the fact that each had continuously resided in the United States for more than seven years and had no prior criminal record. Their requests were not acted upon. Defendants were bussed to El Paso, Texas, and escorted across the border on Nov. 1, 1984.

2. On December 12, 1984, both defendants were arrested in Lincoln, Neb. They were indicted by the grand jury sitting in the District for Nebraska on charges of violating 8 U.S.C. § 1326.

On Feb. 7, 1985, defendants timely filed pretrial motions requesting pretrial judicial review of their deportation proceedings, and dismissal of the indictments against them. Alternatively, defendants moved to suppress and

exclude all evidence relative to the deportation orders of Oct. 30, 1984. On Feb. 22, 1985, the U.S. District Court for the District of Nebraska dismissed the indictments.

The memorandum opinion (found in petitioner's appendix, pages 8a-26a, and hereinafter referred to as pet. app.) supporting the dismissal order found that pretrial judicial review was available to challenge a prior administrative order that represented a material element of a criminal charge. The court noted the strong dissent by Justices Jackson and Frankfurter in *U.S. v. Spector*, 343 U.S. 169 (1952), which stated that an alien "[s]tands on equal constitutional footing with the citizen when he is charged with crime. If Congress can subdivide a charge against an alien and avoid jury trial by submitting the vital and controversial part of it to administrative decision, it can do so in the prosecution of a citizen." *Spector*, supra, at 178. The district court also found persuasive the reasoning of the Third, Seventh and Ninth Circuits that allowed collateral attacks on deportation orders. Pet. App. at 18a. These circuits require that a governmental action be done according to law to be valid. They further state that, for the purposes of 8 U.S.C. § 1326, a deportation must be "a lawful deportation." *U.S. v. Gaska-Kraft*, 522 F.2d 149. 152 (9th Cir. 1975). See also *U.S. v. Bowles*, 331 F.2d 742 (3rd Cir. 1964); *U.S. v. Rosal-Aguilar*, 652 F.2d 721, 723 (7th Cir. 1981).

The district court then found that, after reviewing defendants' deportation proceedings, it was "left with the distinct impression that substantial justice was not done" Pet. App. at 26a. In a detailed factual finding, Judge Urbom stated that the defendants had been denied due process by the ILJ's failure to provide a hearing that was

fundamentally fair. It was "inconceivable that they [the defendants] would so lightly waive their rights to appeal, and thus to the relief they now claim entitlement, if they had been fully apprised of the ramifications of such a choice." Pet. App. at 23a. The swift expulsion of the defendants from this country following their hearing barred any further appeals, even though they were still well within the ten days allowed to appeal the administrative order. Expulsion also interrupted "their prior continuous stay in the United States so as to make them seemingly now ineligible for suspension of deportation." Pet. App. at 24a.

3. The court of appeals affirmed, stating that "[A]llowing a pretrial review of the underlying deportation to examine whether due process was provided ensures fundamental fairness to the rights of the criminal defendant." *United States v. Mendoza-Lopez*, 781 F.2d 111, (8th Cir. 1985). The opinion specifically found that *Lewis v. United States*, 445 U.S. 55 (1980) was inapplicable to the facts at hand. The prior decision in Lewis which that defendant sought to collaterally attack was judicial, not administrative. The court of appeals further found that the district court had correctly ruled that the ILJ did not clearly or adequately inform the defendants of the consequences of the choices they were forced into making. A dissent was entered by Judge Fagg, stating his belief that 8 U.S.C. § 1105a provides the "sole and exclusive" method for obtaining judicial review of deportation orders.

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ARGUMENT

The lower courts were correct in allowing pretrial scrutiny of the administrative deportation order and in finding the defendants were materially harmed by due process violations in their deportations. Judicial review of the proceedings underlying the order of deportation provides for a proper balancing of individual and governmental interests. It provides the least intrusive forum for protecting these interests, while preserving the constitutional integrity of the § 1326 proceedings. A material element of an offense punishable by incarceration should not be established without the protections of criminal due process and a jury trial. *U.S. v. Spector*, 343 U.S. 169, 178 (1952) (Jackson J., dissenting.)

The petitioner's argument, that collateral review should be denied to allow simple and convenient prosecutions, is supported by no legal authority. The 1,185 prosecutions under § 1326 should be looked at in the context of the total number of aliens expelled by INS. The 1984 INS Statistical Yearbook states that 1,379,000 aliens were expelled that year. Of that number, only 20,000 were formally deported. Of the total number expelled, 331,000 had been previously deported or forced to leave.

1. Collateral review does not weaken the function of § 1326. At least two prosecutions have succeeded under § 1326 in Nebraska alone since the district court ruling in February 1985. The facts in this case are unique; if similar situations should arise, collateral atack should and must be available to prevent a grave injustice. It is inequitable to exempt civil deportation hearings from the strict due process requirements of criminal prosecutions and then permit the government to "turn around and use the result

as a conclusive determination of [deportability] in a criminal proceeding." *Spector* at 179.

The lower courts' decisions are limited in scope, and correct in their application; the rulings should not be disturbed.

2. An administrative ruling should not be allowed to supercede the right of the jury to determine all elements of a criminal offense. In *Estep v. U.S.*, 327 U.S. 114 (1946), this Court held that the validity of an administrative order could be reviewed when the order became the foundation for a criminal charge. To deny such a review would be to deny the defendant the opportunity to prove the nonexistence of an essential element of the crime with which he was charged. See also *McGee v. U.S.*, 402 U.S. 479 (1971).

3. Petitioners argue that *Lewis* established the proposition that the underlying validity of a prior conviction is irrelevant. This theory fails on two counts. First, a prior felony conviction is entered in accordance with all the protections of due process afforded a criminal defendant under the constitution. A deportation is civil in nature, with virtually no protections for the alien and a much lower standard of proof. 8 C.F.R. § 242.14 (1985). Secondly, as the district court found. the policies behind the respective statutes are totally disparate. Pet. App. at 17a.

4. The petitioners incorrectly suggest that *Yakus v. U.S.*, 321 U.S. 414 (1944) is analagous to the facts at hand. *Yakus* involved an exercise of rule making power, not the adjudicative powers of the INS. Therefore, a different scope of review is involved. *Yakus*-type determinations are

akin to delegated legislative authority, and are subject only to an examination for constitutionality. A deportation hearing is measured against procedural safeguards for the equitable treatment of individuals.

5. Finally, petitioners state that the language of the Immigration and Nationalization Act prohibits collateral attacks in § 1326 prosecutions. An analysis of 8 U.S.C. § 1105a and its scant legislative history, however, yields little support for this proposition. The Congressional record does not show that § 1326 prosecutions were considered at all, although it is clear that Congress was concerned with protecting the due process rights of aliens subject to deportation proceedings. H.R. Rep. No. 1086 at 17-19, *reprinted* in 1961 U.S. CODE CONG. & AD NEWS at 2972-73. Furthermore, § 1105a is the civil deportation review statute, and applies only to aliens still empowered to raise civil attacks by their continuing presence in the United States.

The facts of this case clearly illustrate why collateral review is essential. The defendants are barred from any civil judicial review of their deportation order. Their right to an administrative appeal ended when they crossed the border into Mexico. The underlying deportation was entered in violation of their rights to due process. Collateral attack must be available to allow a full hearing on the issues in a criminal action predicated on a constitutionally invalid deportation order.

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CONCLUSION

The lower courts' rulings are correct and appropriate. The petition for a writ of certiorari should be denied.

Respectfully submitted.

KATHY GOUDY
Attorney for the Respondents

No. 85-2067

Supreme Court, U.S.
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UNITED STATES OF AMERICA, PETITIONER

v.

JOSE MENDOZA-LOPEZ AND ANGEL LANDEROS-QUINONES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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Respondents do not seriously dispute our contention that the question presented in this case is one of great importance to the administration of the immigration laws. Nor do respondents dispute, as the court of appeals here acknowledged (Pet. App. 3a), that the circuits are badly split on the issue: three circuits do not permit collateral attacks on the validity of deportation proceedings in prosecutions under 8 U.S.C. 1326, while four circuits permit collateral attacks in some circumstances (Pet. App. 3a). Instead, respondents contend that review is not warranted because the court of appeals here decided the issue correctly. Although that is not a sufficient ground for this Court to deny certiorari, we reply briefly to the points raised by respondents.

Respondents contend (Br. in Opp. 6) that the language of 8 U.S.C. 1105a provides "little support" for our argument that collateral attacks on the validity of deportation proceedings should not be permitted in prosecutions under

Section 1326. They argue that Section 1105a "is the civil deportation review statute, and applies only to aliens still empowered to raise civil attacks by their continuing presence in the United States" (Br. in Opp. 6). To the contrary, Section 1105a clearly provides that it is the "sole and exclusive procedure for * * * judicial review of all final orders of deportation." Furthermore, contrary to respondents' suggestion that Section 1105a somehow does not apply to criminal proceedings, Section 1105a(a)(6) provides that an alien who fails to depart may collaterally attack the validity of his deportation order in a prosecution under 8 U.S.C. 1252(d) for failure to depart after being ordered to do so. That provision makes it clear that when it enacted Section 1105a, Congress had in mind the question whether collateral attacks on the validity of deportation orders should be permitted in a defense to criminal charges. By providing that the methods listed in Section 1105a are the "sole and exclusive" procedures for obtaining judicial review of deportation orders, Congress apparently intended not to permit such attacks in other settings, such as cases involving aliens who were deported and then reentered the United States without the permission of the Attorney General.

Relying primarily on the dissenting opinion in *United States* v. *Spector*, 343 U.S. 169 (1952), respondents suggest that due process requires that they be permitted to collaterally attack the validity of their deportation orders. As we noted in our petition, this Court stated in *Yakus* v. *United States*, 321 U.S. 414, 444 (1944), that there is "no principle of law or provision of the Constitution which precludes Congress from making criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity." Respondents distinguish *Yakus* (Br. in Opp. 5-6) by noting that it involved an exercise of rulemaking rather than adjudicative power. While that is so, it does not change

the essential point, which is that Congress can constitutionally permit a jury to rely on the fact that a prior adminstrative order was violated, rather than requiring a review of the administrative proceeding as part of the criminal prosecution.

Contrary to respondents' contention (Br. in Opp. 5), nothing in *Estep* v. *United States*, 327 U.S. 114 (1946), supports their argument on this point. The Court in *Estep* stressed that the criminal statute at issue was silent as to whether courts were to review the adminstrative action underlying the prosecution (*id.* at 119), and concluded that Congress intended that defendants should be permitted to attack the underlying administrative action (*id.* at 121). Here, by contrast, Congress was not silent and plainly intended to make criminal the act of reentering the United States following a deportation.

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

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QUESTION PRESENTED

Whether defendants prosecuted under 8 U.S.C. 1326 for reentering the United States after having been deported may collaterally attack the validity of their deportation proceedings.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 781 F.2d 111. The opinion of the district court (Pet. App. 8a-26a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 1985. A petition for rehearing was denied on March 18, 1986 (Pet. App. 29a). On May 6, 1986, Justice Blackmun extended the time for filing a petition for a writ of certiorari to June 16, 1986. The petition for a writ of certiorari was filed on that date and was granted on October 6, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

8 U.S.C. 1105a provides:

> (a) The procedure prescribed by, and all the provisions of Chapter 158 of Title 28 [review of orders of federal agencies] shall apply to, and shall be the sole

and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title [proceedings to determine deportability] or comparable provisions of any prior Act, except that—

* * * * *

(6) if the validity of a deportation order has not been judicially determined, its validity may be challenged in a criminal proceeding against the alien for violation of subsection (d) or (e) of section 1252 of this title [supervision of deportable alien and penalty for willful failure to depart] only by separate motion for judicial review before trial. * * *

* * * * *

(9) any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

* * * * *

(c) An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. * * *

8 U.S.C. 1326 provides:

Any alien who—

(1) has been arrested and deported or excluded and deported, and thereafter

(2) enters, attempts to enter, or is at any time found in the United States, unless (A) prior to his reembarkation at a place outside the United

> States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,
>
> shall be guilty of a felony, and upon conviction thereof, shall be punished by imprisonment of not more than two years, or by fine of not more than $1,000, or both.

STATEMENT

1. In October 1984, the two respondents and 11 other aliens were found deportable at a joint deportation hearing before an immigration judge. Respondents waived their right to appeal the deportation order. Pet. App. 22a-23a.[1] They were escorted across the border at El Paso and given a form that stated, in Spanish and English, that they would be subject to felony charges if they returned. Two months later, respondents were discovered in Lincoln, Nebraska. They were arrested and indicted for violating 8 U.S.C. 1326, which provides that "[a]ny alien who—(1) has been arrested and deported or excluded and deported, and thereafter (2) enters, attempts to enter, or is at any time found in the United States" without the Attorney General's permission is subject to imprisonment for not more than two years. Pet. App. 9a-10a.

The district court dismissed the indictments (Pet. App. 26a). The court first ruled that a defendant in a prosecution under Section 1326 may collaterally attack the validity

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[1] Respondents could have appealed the immigration judge's order to the Board of Immigration Appeals (8 C.F.R. 242.21) and then to a federal court of appeals (8 U.S.C. 1105a(a)).

of the underlying deportation order (Pet. App. 18a). It next determined that respondents were denied due process at their deportation hearing because they had not been made aware that they could apply for suspension of deportation. The court acknowledged that the immigration judge had "technically" complied with the Immigration and Naturalization Service regulation requiring that the defendants be advised that they were eligible for suspension of deportation (*id.* at 22a-23a).[2] The court stated, however, that its review of the hearing showed that "neither of the defendants in this case was in a position to evalute [his rights] intelligently" (*id.* at 23a). The court went on to conclude that respondents were prejudiced because they might have obtained suspension of deportation if they had been able to make an intelligent evaluation of the alternatives open to them (*id.* at 24a).

2. The court of appeals affirmed (Pet. App. 1a-7a). It noted (*id.* at 2a) that in *United States* v. *Spector*, 343 U.S. 169, 172-173 (1952), this Court reserved the question whether a defendant can collaterally attack an order of deportation. The court of appeals recognized that the circuits are divided on the issue,[3] and it sided with those circuits that have permitted collateral attacks on deportation

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[2] The applicable regulation, 8 C.F.R. 242.17(a), provides that "[t]he special inquiry officer shall inform the respondent of his apparent eligibility to apply for any of the benefits enumerated in this paragraph [which include suspension of deportation] and shall afford him an opportunity to make application therefor during the hearing."

[3] The court listed (Pet. App. 3a) *United States* v. *Petrella*, 707 F.2d 64 (2d Cir.), cert. denied, 464 U.S. 921 (1983); *United States* v. *Gonzalez-Parra*, 438 F.2d 694 (5th Cir.), cert. denied, 402 U.S. 1010 (1971); and *Arriaga-Ramirez* v. *United States*, 325 F.2d 857 (10th Cir. 1963), as not permitting collateral attack; it listed *United States* v. *Rosal-Aguilar*, 652 F.2d 721 (7th Cir. 1981); *United States* v. *Gasca-Kraft*, 522 F.2d 149 (9th Cir. 1975); and *United States* v. *Bowles*, 331 F.2d 742 (3d Cir. 1964), as permitting collateral attack.

orders. The court held that "a material element of the offense prohibited by 8 U.S.C. 1326 is a 'lawful' deportation and that, therefore, when prosecuting a Section 1326 proceeding, the government must prove beyond a reasonable doubt that the defendant illegally entered the United States after being deported according to law" (Pet. App. 3a).[4]

The court rejected the government's contention that this issue is analogous to the issue presented in *Lewis* v. *United States*, 445 U.S. 55 (1980), where this Court held that a defendant in a prosecution for possession of a firearm by a felon could not collaterally attack the validity of his felony conviction. The court of appeals stated that "[i]n *Lewis* the prior decision was judicial, not administrative" and that "while it can be said that Congress had a legitimate interest in prohibiting the possession of firearms by those whose brushes with the law resulted only in invalid convictions, it cannot likewise be said that Congress intended to expel from this country all aliens, even those who have a legitimate right to be here" (Pet. App. 2a-3a & n.1).[5]

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[4] This broad language suggests that in the court's view the question whether defendants were deported lawfully must be submitted to the jury. Other language in the opinion suggests that pretrial review of the deportation order by the court is adequate. Pet. App. 4a. Most of the courts that have permitted collateral attacks in Section 1326 prosecutions have held that pretrial review of the validity of the deportation proceeding by the trial court is adequate. *Rosal-Aguilar*, 652 F.2d at 722-723; *Bowles*, 331 F.2d at 750; compare *United States* v. *Bejar-Matrecious*, 618 F.2d 81, 82-83 (9th Cir. 1980), with *United States* v. *Hernandez-Rojas*, 617 F.2d 533, 535 (9th Cir. 1980); see also Note, *Collaterally Attacking Deportation Orders in Criminal Prosecutions for Illegal Reentry Under Section 276 of the Immigration and Nationality Act of 1952*, 56 Notre Dame Law. 677, 682, 687 (1981). Pretrial review of the validity of deportation orders, but not submission of the issue to the jury, is authorized by 8 U.S.C. 1105a(a)(6) in prosecutions for failure to leave after being ordered deported.

[5] The court of appeals briefly addressed the questions whether the district court was correct in holding that the deportation hearing was

Judge Fagg, dissenting, pointed out that "Section 1326 clearly speaks only of the fact and not the quality of a previous deportation" (Pet. App. 5a). He noted (*ibid.*) that this Court in *Lewis* held that Congress did not intend for courts to inquire into the lawfulness of felony convictions under the statute prohibiting possession of a firearm by a convicted felon. By analogy, he concluded, in prosecutions under Section 1326 a court should not inquire into the lawfulness of prior deportations. Furthermore, Judge Fagg stated (Pet. App. 6a) that his analysis of "the comprehensive scheme for judicial review that is available to aliens" under 8 U.S.C. 1105a showed that Congress intended that aliens would not be permitted to challenge deportation orders during prosecutions for unlawful reentry (Pet. App 6a-7a). Finally, he concluded that the Constitution does not require that aliens be permitted to attack the validity of their prior deportation proceedings in prosecutions under Section 1326 (Pet. App. 7a).

SUMMARY OF ARGUMENT

Section 276 of the Immigration and Nationality Act, 8 U.S.C. 1326, provides that it is a criminal offense for a previously deported alien to reenter the United States

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invalid and whether respondents were prejudiced as a result. The court concluded that the district court had not clearly erred in its rulings on those two points (Pet. App. 4a). We did not challenge that conclusion in our petition for a writ of certiorari. We note nevertheless that the district court found only a "technical" violation of the required procedures (*id.* at 22a-23a). Furthermore, contrary to the district court's conclusion, it is highly unlikely that respondents were prejudiced as a result of the immigration judge's failure to explore the possibility that they might qualify for suspension of deportation. Suspension of deportation is an extraordinary remedy that is seldom granted, and its requirements have been strictly construed. See *INS* v. *Rios-Pineda*, 471 U.S. 444 (1985); *INS* v. *Phinpathya*, 464 U.S. 183 (1984); *INS* v. *Jong Ha Wang*, 450 U.S. 139 (1981).

without the Attorney General's permission. The plain language of the statute gives no support to the court of appeals' conclusion that the "lawfulness" of the prior deportation order is an element of a Section 1326 violation. Nor is there anything in the legislative history of Section 1326 to indicate that Congress intended to permit collateral attacks on the validity of deportation orders in Section 1326 prosecutions. To the contrary, the legislative background strongly suggests that Congress did not mean to require the government to prove that a defendant was deported lawfully. The predecessor to Section 1326 provided that it was a crime to reenter the United States after having been deported "in pursuance of law," and Congress omitted that phrase or any equivalent when it enacted the current version of Section 1326.

Congress's intent not to permit collateral attacks on deportation orders in Section 1326 proceedings is further reflected by other provisions of the Immigration and Nationality Act. Section 1105a of the Act provides what it terms the "sole and exclusive" procedure for obtaining judicial review of deportation orders. That section thus creates a mechanism by which persons who are ordered deported can obtain review of their deportation orders. At the same time, the provision for exclusivity in that section rebuts the claim that the validity of deportation orders can be independently reviewed in the course of criminal proceedings under Section 1326. Congress's intent to bar collateral attacks on deportation orders is also strongly supported by a specific provision permitting such challenges in other criminal proceedings under the Act. In 8 U.S.C. 1105a(a)(6), Congress explicitly permitted defendants to challenge the validity of their deportation orders in prosecutions for failing to depart from the United States after being ordered deported (8 U.S.C. 1252(e)), and in prosecutions for violating the supervisory regulations after being ordered deported (8 U.S.C. 1252(d)). By contrast,

there is no such express authorization for collateral attacks on deportation orders in proceedings under Section 1326. In fact, another provision of the Immigration and Nationality Act, 8 U.S.C. 1105a(c), flatly bars challenges to the validity of a deportation order after the alien has been deported. In light of the legislative background and context of Section 1326, the conclusion that Congress did not intend to permit collateral attacks on deportation orders in prosecutions brought under Section 1326 is inescapable.

There is nothing unconstitutional about Congress's decision to prohibit the act of reentry into the United States by a deported alien without permitting review of the underlying deportation order as part of the criminal prosecution. A different question would be presented if no provision whatever were made for judicial review of the deportation order. Section 1105a of the Act, however, provides a mechanism for review of deportation orders. It is not fundamentally unfair to prosecute aliens who do not appeal their deportation orders but then return to the United States without the Attorney General's permission; in that setting, no principle of due process requires that the aliens be permitted to challenge the validity of the prior deportation orders that they declined to challenge at the time the orders were entered.

ARGUMENT

DEFENDANTS PROSECUTED UNDER SECTION 1326 FOR REENTERING THE UNITED STATES AFTER HAVING BEEN DEPORTED MAY NOT COLLATERALLY ATTACK THE VALIDITY OF THEIR DEPORTATION PROCEEDINGS

A. The Language And Legislative History Of Section 1326 Demonstrate That A "Lawful" Deportation Is Not An Element Of The Offense Prohibited By That Section

In 1984, when respondents were ordered deported, they waived their right to appeal their deportation orders. At the time of their deportation, respondents were informed that

they would be subject to felony charges if they returned to the United States without permission. They nevertheless returned without authorization, and they now argue that in order to convict them of making an unauthorized reentry into the country after having been deported, the government must prove that their deportation proceeding was conducted lawfully.

1. Nothing in the Immigration and Nationality Act, 8 U.S.C. (& Supp. II) 1101 *et seq.*, supports respondents' argument.[6] Rather, the Act makes clear that Congress intended to prohibit deported aliens from returning to this country without the Attorney General's permission. There is no suggestion that Congress meant to permit returning aliens to attack orders under which they had previously been deported.

This Court has stated repeatedly that "in any case concerning the interpretation of a statute the 'starting point' must be the language of the statute itself." *Lewis* v. *United States*, 445 U.S. 55, 60 (1980), quoting *Reiter* v. *Sonotone Corp.*,, 442 U.S. 330, 337 (1979); see also *United States* v. *James,* No. 85-434 (July 2, 1986), slip. op. 6; *Randall* v. *Loftsgaarden*, No. 85-519 (July 2, 1986), slip op. 8; *United States Department of Transportation* v. *Paralyzed Veterans*, No. 85-289 (June 27, 1986), slip op. 6; *Board of Governors* v. *Dimension Financial Corp.*, No. 84-1274 (Jan. 22, 1986), slip op. 12; *United States* v. *Rojas-Contreras*, No. 84-1023 (Dec. 16, 1985), slip op. 3. Section 1326 unambiguously provides that "[a]ny alien who—(1) has been arrested and deported or excluded and deported, and thereafter (2) enters, attempts to enter, or is at any time found in the United States" without the Attorney General's permission is subject to imprisonment for not more than two years. The statute does not require that the

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[6] Although the Immigration and Nationality Act has recently been substantially revised, none of the 1986 amendments to the Act affect the issues in this case.

alien must have been "lawfully" deported, nor does it contain any other language supporting the conclusion that a defendant in a prosecution under Section 1326 may collaterally attack the validity of the underlying deportation order. Rather, the language of the statute plainly and simply provides that it is a crime to reenter the United States without the Attorney General's permission after having been deported.[7] Under the plain language of the statute, it is the *fact* of deportation, not its lawfulness, that provides the basis for criminal liability.

It is beyond dispute that Congress could rationally choose to make unauthorized reentry criminal, without regard to the lawfulness of the deportation. Permitting collateral attacks on the validity of deportation orders poses serious practical problems in cases where the underlying deportation proceeding occurred many years before the prosecution for reentry. To permit such collateral attacks would reward the self-help remedy of reentry without permission. By contrast, prohibiting reentry without regard to the validity of the deporation order provides an incentive to the alien to challenge the validity of deportation orders promptly or to seek permission from the Attorney General before reentering.

By prohibiting reentry on the part of a previously deported alien, Section 1326 is analogous to 18 U.S.C. App. 1202(a)(1), which prohibits previously convicted felons from possessing firearms, and 18 U.S.C. 751, which prohibits previously convicted felons from attempting to escape from federal custody. This Court held in *Lewis* v. *United States, supra*, that Congress chose to make possession of a firearm by a felon a criminal offense, regardless

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[7] Aliens who have been deported may request permission to reenter by completing Form I-212, "Application for Permission to Reapply for Admission into the United States after Deportation or Removal." See 8 C.F.R. 212.2.

of the validity of the underlying felony conviction.[8] Similarly, the courts of appeals have uniformly held that defendants in prosecutions for escaping from federal custody may not challenge the validity of the convictions that led to their being in custody. See *United States* v. *Pereira*, 574 F.2d 103, 106 n.6 (2d Cir. 1978); *United States* v. *Cluck*, 542 F.2d 728, 732 (8th Cir.), cert. denied, 429 U.S. 986 (1976); *United States* v. *Smith*, 534 F.2d 74, 75 (5th Cir. 1976), cert. denied, 429 U.S. 1100 (1977).

Relying on *United States* v. *Rosal-Aguilar*, 652 F.2d 721 (7th Cir. 1981); *United States* v. *Gasca-Kraft*, 522 F.2d 149 (9th Cir. 1975); and *United States* v. *Bowles*, 331 F.2d 742 (3d Cir. 1964), the court of appeals nevertheless held that "a material element of the offense prohibited by 8 U.S.C. § 1326 is a 'lawful' deportation." Pet. App. 3a. There is simply no basis for that construction of the statute.

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[8] The court of appeals noted (Pet. App. 2a-3a n.1) that the ultimate resolution of the issue in *Lewis* turned on the language of the statute at issue there and Congress's intent in passing it. That is correct. Our point is simply that in some situations Congress reasonably may desire to prohibit specific conduct (possession of a firearm or reentry into the United States) by a class of individuals (felons or deported aliens) without premitting reconsideration of the facts that led to the determination that the individual was a member of the class in question. The court of appeals further noted (*ibid.*) that "while it can be said that Congress had a legitimate interest in prohibiting the possession of firearms by those whose brushes with the law resulted only in invalid convictions, it cannot likewise be said that Congress intended to expel from this country all aliens, even those who have a legitimate right to be here." That comment misses the point. While Congress does not intend to expel aliens who have a right to be in this country, it certainly has an interest in ensuring that aliens who have been determined not to have the right to be in this country follow the procedures it has established in challenging that determination.

The construction of the statute requiring proof that the deportation was lawful originated with the Third Circuit's decision in the *Bowles* case. The court of appeals in that case stated, without citation of authority, that "[w]hen Congress made use of the word 'deported' in the statute, it meant 'deported according to law.' " 331 F.2d at 749 (emphasis in original). The court, however, did not explain why, if Congress meant to say "deported according to law," it did not say so explicitly. Nor has any court since *Bowles* provided any more support for that construction of the statute than the *ipse dixit* assertion in the *Bowles* case itself. The Court in *Gasca-Kraft* merely relied on prior cases, primarily *Bowles*, in holding that "[a] material element of the offense defined by 8 U.S.C. § 1326 is a *lawful* deportation." 522 F.2d at 152 (emphasis in original).[9] The court of appeals decisions on which the court in this case relied thus provide no persuasive justification for departing from the plain language of Section 1326. As this Court has stated repeatedly in response to efforts to read additional elements into criminal statutes, " '[t]he short answer is that Congress did not write the statute that way.' " *Russello* v. *United States*, 464 U.S. 16, 23 (1983), quoting *United States* v. *Naftalin*, 441 U.S. 768, 773 (1979); see *United States* v. *Culbert*, 435 U.S. 371, 373-374 (1978). Rather, "[t]he lack of any express reference to the validity of the deportation or of the arrest indicates that the statute seeks to punish the unauthorized reentry of an alien previously deported, regardless of whether the deportation was 'lawful.' " *United States* v. *Petrella*, 707 F.2d 64, 66 (2d Cir. 1983).

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[9] The court in *Gasca-Kraft* also relied upon *United States* v. *Heikkinen*, 221 F.2d 890, 892 (7th Cir. 1955), where the court, in a prosecution under 8 U.S.C. 1252(e) for failure to depart, stated without citation of authority that the validity of the underlying deportation order "is an inescapable ingredient of the statutory offense with which defendant is charged."

2. Nothing in the legislative history of Section 1326 justifies inserting the word "lawful" into that statute. Section 1326 was adopted in 1952 as part of the Immigration and Nationality Act. Prior to 1952, reentry into the United States by an alien who had been deported was prohibited by 8 U.S.C. (1946 ed.) 180, which was enacted in 1929. Section 180 was adopted because Congress concluded that "[a] serious situation has arisen, particularly on our land borders, whereby people deported to contiguous countries turn around and come back again without further penalty than exclusion or another deportation." H.R. Rep. 2418, 70th Cong., 2d Sess. 6 (1929). Congress remedied that situation by providing in Section 180 for two years' imprisonment, in addition to exclusion or deportation, for "any alien * * * arrested and deported in pursuance of law, * * * [who] enters or attempts to enter the United States." Since that statute made its penalties applicable in cases where an alien had been deported "in pursuance of law," there would have been a basis for arguing that collateral attacks were authorized under Section 180.[10]

The phrase "in pursuance of law" was deleted when Section 1326 was enacted.[11] While Congress did not explain why it deleted that phrase, the most reasonable explana-

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[10] We have found no case addressing the question whether collateral attacks were permitted in criminal prosecutions under Section 180. However, there were several such cases involving the deportation of an alien under Section 180 on the ground that the alien had previously been deported. And in those cases, despite the inclusion of the phrase "in pursuance of law" in Section 180, the courts held that collateral attacks on the validity of the underlying deportation were not permitted, at least in the absence of "a gross miscarriage of justice in the former proceedings." *United States ex rel. Rubio* v. *Jordan*, 190 F.2d 573, 576 (7th Cir. 1951); see also *United States ex rel. Bartsch* v. *Watkins*, 175 F.2d 245, 247 (2d Cir. 1949).

[11] Section 1326 is similar to Section 180 in most other respects. One difference is that Section 1326 makes it a crime for a deported alien to be "found in the United States." Section 180 prevented only reentry,

tion for the deletion is that Congress wanted to make criminal the act of reentering the United States following a deportation, without regard to the lawfulness of the deportation. In any event, it seems clear that the drafters of Section 1326 made a conscious decision not to require proof that a prior deportation was "lawful," since they had to take the affirmative step of striking the phrase "in pursuance of law" that had appeared in Section 180.[12]

The deletion of the phrase "in pursuance of law" from Section 1326 is analogous to the deletion of limiting language from an early version of a bill. This Court has stated that "[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello*, 464 U.S. at 23-24. Similarly, where Congress deletes a phrase from prior law in the course of enacting a new law, it ought to be presumed that Congress did not intend to preserve the requirement that would have been imposed by the deleted phrase. Therefore, the fact that "in pursuance of law" was deleted by Congress when it enacted Section 1326 strongly counsels against inserting the word "lawful" into that provision, as the court of appeals did in this case.

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which led to problems in establishing venue in cases in which aliens were found in the United States after their deportation, but in which the government could not determine where they reentered. *Revision of the Immigration, Naturalization, and Nationality Laws: Joint Hearings on S. 716, H.R. 2379, and H.R. 2816 Before Subcommittees of the Committees on the Judiciary*, 82d Cong., 1st Sess. 716 (1951) (statement of Deputy Attorney General Ford).

[12] The House Report on the Immigration and Nationality Act, which compared the "proposed law" to the "existing law," printed the text of Section 1326 next to the text of Section 180, so the change was apparent to anyone who read the report. H.R. Rep. 1365, 82d Cong., 2d Sess. 219-220 (1952).

B. Section 1105a Provides The "Sole And Exclusive" Procedure For Obtaining Judicial Review Of Orders Of Deportation, And It Bars Post-Deportation Review Of Deportation Orders

The statutory provision that deals expressly with judicial review of deportation orders, 8 U.S.C. 1105a, makes clear that Congress did not intend to permit collateral attacks on the validity of deportation hearings in Section 1326 prosecutions. Section 1105a(a) provides that the procedure under which orders of federal agencies are reviewed in the federal courts of appeals (see 28 U.S.C. 2341 *et seq.*) is the "sole and exclusive procedure for * * * judicial review of all final orders of deportation." Thus, under Section 1105a(a) an alien may obtain review of a deportation order by exhausting his administrative remedies and filing a petition for review within six months of the date of the final deportation order (8 U.S.C. 1105a(a)(1)).[13]

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[13] Prior to 1952, it was clear that deportation orders could be challenged only through habeas corpus proceedings. *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 50 (1955). The Court held in *Pedreiro* that under the 1952 Act aliens ordered deported could also challenge deportation orders under the Administrative Procedure Act. After a number of aliens succeeded in delaying their deportations for many years through such challenges, Congress in 1961 enacted Section 1105a to limit review of deportation proceedings. Note, *Deportation and Exclusion: A Continuing Dialogue Between Congress and the Courts,* 71 Yale L. J. 760, 760-762 (1962). The House Report on the 1961 amendment stated that "[t]he purpose of [Section 1105a] is to create a single, separate, statutory form of judicial review of administrative orders for the deportation and exclusion of aliens from the United States." H.R. Rep. 1086, 87th Cong., 1st Sess. 22 (1961). The legislative history is replete with statements showing Congress's disapproval of decisions permitting aliens to delay execution of deportation orders by filing repetitive requests for relief under various statutes. See, *e.g.*, *id.* at 22-23; 107 Cong. Rec. 12175 (1961) (statement of Rep. Walter). In holding that collateral attacks are not permitted in Section 1326 prosecutions, the court of appeals in *United States* v. *Petrella, supra*, cited recent cases in which aliens have suc-

There are two exceptions to the rule that review of deportation orders in the courts of appeals following appeal to the Board of Immigration Appeals is the sole and exclusive method of judicial review. First, Section 1105a(a)(9) provides that an alien "held in custody pursuant to an order of deportation" may obtain judicial review through habeas corpus proceedings. Second, Section 1105a(a)(6) provides that defendants in prosecutions under 8 U.S.C. 1252(d) and 8 U.S.C. 1252(e) may challenge the validity of their deportation orders in the criminal proceedings against them. Section 1252(d) prohibits aliens from violating supervisory regulations after being ordered to be deported, and Section 1252(e) penalizes the failure to depart after being ordered to do so.

Section 1105a(a)(6) makes it perfectly clear that Congress knew how to permit collateral attacks on the validity of deportation orders in criminal prosecutions when it wanted to do so. The fact that Congress did not provide such an exception in the case of prosecutions for reentering the United States in violation of Section 1326, while it did so in the case of prosecutions for failing to depart in violation of Section 1252(e) and prosecutions for failing to observe supervisory regulations in violation of Section 1252(d), makes it all the more clear that it did not intend to permit collateral attacks in unlawful reentry cases.

If Congress had intended to permit collateral attacks in unlawful reentry cases, it presumably would have added a separate exception to Section 1105a providing for review in those cases. By the same token, if Congress had believed that Section 1326 permitted collateral attacks on deportation orders even though it does not expressly provide for such challenges, it is difficult to explain why Congress

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ceeded in delaying deportation for many years and stated that it was "loath to add a further avenue of attack on deportation orders, in view of the formidable administrative and judicial arsenal available to litigants seeking review of such orders." 707 F.2d at 66 n.3.

would have felt the need to make express provision for such challenges in the case of prosecutions brought under Section 1252(d) and (e).[14]

Another provision of Section 1105a makes it even more evident that Congress did not mean to permit an alien to challenge the validity of his deportation order after he had been deported and had made an unauthorized reentry into this country. Section 1105a(c) provides that an "order of deportation or exclusion shall not be reviewed in any court if the alien * * * has departed from the United States after issuance of the order." That provision evinces a clear congressional intention to restrict the time and setting of challenges to the validity of deportation orders. In light of Congress's express and unqualified determination that deportation orders shall not be challenged after the alien

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[14] Congress did not explain why it authorized collateral attacks in cases where aliens had not left the United States (Section 1252(e)), or had violated supervisory regulations (Section 1252(d)), but did not authorize collateral attacks in cases where aliens had been deported (Section 1326). Nonetheless, there are at least two reasons why Congress might have chosen that course. First, Congress might have been concerned about the argument made by the dissenters in *Spector* that some aliens ordered deported might not find a country that would accept them (343 U.S. at 179-180). In such cases an alien prosecuted for failing to leave or for violating supervisory regulations could presumably raise his failure to find a country that would accept him as a reason why the underlying deportation order should be overturned; an alien who was deported and reentered, by contrast, could not argue that no country would accept him. Second, Congress might have thought that most prosecutions for failing to depart and for violating supervisory regulations would be conducted at a time when it would not be difficult to examine the procedures followed at the deportation proceeding in question. Prosecutions for reentry, by contrast, would often occur at a much later date when it would be more difficult to reconstruct the circumstances of the deportation hearing. That congressional purpose is consistent with the restriction on the right to challenge deportation orders that Congress inserted in Section 1105a(c), which bars any review of an order of deportation after the alien has left the United States.

has left the country, it would be quite anomalous to suggest that Congress meant to permit precisely those kinds of challenges in prosecutions under Section 1326, even though it included nothing to that effect in the language of the statute.

None of the courts that have permitted collateral attacks in Section 1326 prosecutions have offered any explanation why Congress would not have provided in Section 1105a for review of deportation proceedings in Section 1326 prosecutions if it intended to authorize such collateral review.[15] Yet, as the court concluded in *Petrella* (707 F.2d

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[15] The district court in this case noted (Pet. App. 14a) that the court in *Mendez* v. *INS*, 563 F.2d 956 (9th Cir. 1977), "rejected the INS contentions that the alien's appeal was barred by 8 U.S.C. § 1105 (a) [*sic*]." In *Mendez* an alien who was deported under 8 U.S.C. 1251(a)(4) because he had been convicted of a crime and sentenced to one year's imprisonment sought reconsideration by the Board of Immigration Appeals because the court that had sentenced him vacated its previous order and imposed a sentence of less than a year, which is not a basis for deportation. 563 F.2d at 957. The court held that Section 1105a(c), which provides that a deportation order may not be reviewed "if [the alien] has departed from the United States after the issuance of the order," did not deprive it of jurisdiction over the alien's claim that the Board should reconsider its deportation order. The decision in *Mendez* is clearly inapposite. The alien in *Mendez* was pursuing his "sole and exclusive" remedy, review of deportation orders by the Board, and the decision in that case is limited to the effect of deportation on an alien's right to continue to pursue that remedy. Nothing in *Mendez* addresses the question whether, in addition to the three procedures set forth in Section 1105a, an alien may challenge his deportation order in a prosecution under Section 1326. Ninth Circuit opinions have nevertheless cited *Mendez* in deciding not to reconsider the holding in *Gasca-Kraft* that defendants in Section 1326 prosecutions may collaterally attack their deportation orders (see, *e.g.*, *United States* v. *Calderon-Medina*, 591 F.2d 529, 530 n.4 (9th Cir. 1979); *United States* v. *Barraza-Leon*, 575 F.2d 218, 220 (9th Cir. 1978)). Like *Gasca-Kraft*, the subsequent decisions have failed to address the fact that Section 1105a provides the "sole and exclusive" procedure for challenging deportation orders and does not provide for challenges in Section 1326 prosecutions.

at 66), Congress's refusal to provide in Section 1105a for review of deportation orders in prosecutions for reentering the United States without the Attorney General's permission clearly shows that Congress intended to bar collateral attacks in those cases.

C. The Constitution Does Not Require Section 1326 To Be Construed To Provide For Collateral Attacks On The Validity Of Deportation Orders

The court of appeals suggested (Pet. App. 4a) that permitting collateral attacks on deportation proceedings in Section 1326 prosecutions "insures fundamental fairness." Contrary to the court's suggestion, there is nothing unfair about punishing the act of unauthorized reentry into the United States following deportation. An alien who has been ordered deported and who wants to challenge his deportation order may do so pursuant to Section 1105a. It is certainly preferable, from the alien's point of view, to be permitted to challenge his deportation order in a civil proceeding than to be forced to risk criminal sanctions in order to challenge the order. Nor is there anything unfair about requiring an alien to challenge his deportation order before leaving the country or not at all. That requirement is analogous to any other requirement that forces a litigant to raise a claim at a specified time or waive it. Furthermore, unlike most criminal defendants, defendants in Section 1326 prosecutions are typically given written notice at the time of their deportation proceedings that they will be subject to felony charges if they return to the United States without the Attorney General's permission. Pet. App. 9a. Finally, even the alien who fails to challenge his deportation at the time it is issued is not forever foreclosed from returning to this country; if he obtains permission to reenter, he can return without being subject to the sanctions of Section 1326. Under those circumstances, it is

hard to understand how it could be fundamentally unfair to prosecute a returning alien who has declined to challenge his deportation at the appropriate time.

Citing *United States* v. *Spector*, 343 U.S. 169 (1952), the Third Circuit in *United States* v. *Bowles* stated that by construing the term "deported" in Section 1326 to mean "deported according to law" it was able to avoid a "serious constitutional issue" (331 F.2d at 749 & n.13). The dissenters in *Spector* contended that the Constitution requires that an alien be shown to be deportable before he can be convicted of unlawfully failing to depart. Some of their concerns, however, were addressed by Congress when it subsequently enacted Section 1105a. First, at the time *Spector* was decided, it was not clear that deportation orders were subject to judicial review at all (see 343 U.S. at 179 (Jackson and Frankfurter, JJ., dissenting)); Section 1105a(a) now makes it clear that deportation orders are reviewable by the courts of appeals. Second, the *Spector* dissenters were concerned that some aliens who were ordered deported might not find a country that would accept them (343 U.S. at 179-180); because Section 1105a(a)(6) authorizes judicial review of the validity of a deportation order in the case of an alien who is prosecuted for failing to leave the country, an alien who cannot find a country that will accept him can obtain judicial review of the validity of the deportation order in his criminal proceeding, even if he has not pursued an appeal under Section 1105a(a).

The dissenters in *Spector* were particularly troubled by the fact that criminal liability was being imposed for remaining in the country after being ordered deported; in effect, the statute imposed criminal liability for failing to comply with an order of deportation. Under Section 1326, by contrast, the offense at issue is quite different in character: the defendant does not violate the statute simply by failing to respond to the deportation order. Instead,

he must take the affirmative step of reentering the country before he is liable to prosecution. In that setting, unlike in *Spector*, denying the defendant the right to challenge his deportation order does not have the effect of subjecting the only meaningful feature of the criminal case to binding administrative resolution. Thus, it is not clear that even the dissenters in *Spector* would have had the same constitutional reservations about barring collateral attacks under the current statutory scheme.

At all events, any constitutional objections to the scheme established in Section 1326 were resolved by this Court's decision in *Lewis* v. *United States,* 445 U.S. 55 (1980). In *Lewis*, which was decided after the Third Circuit's decision in *Bowles*, this Court held that a defendant prosecuted for being a previously convicted felon in possession of a firearm could not collaterally attack the validity of his prior conviction in the criminal case. In response to the defendant's due process claim, the Court held that Congress could constitutionally focus "on the mere fact of conviction, [regardless of the validity of the conviction,] as a way to keep firearms away from potentially dangerous persons" (445 U.S. at 67). The Court noted that a convicted felon could "challenge the validity of a prior conviction, or otherwise remove his disability, before obtaining a firearm" (*ibid.*). Similarly, in the case of deported aliens, Congress could reasonably determine to limit the elements of the criminal offense to (1) reentry into the United States, (2) without the Attorney General's permission, (3) after having been deported. Like a convicted felon, an alien who is subject to a deportation order has other avenues for obtaining relief. He may challenge the validity of the deportation order in the ways enumerated in Section 1105a, or he may attempt to obtain the Attorney General's permission before reentering the United States.[16]

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[16] Because other avenues for obtaining relief are available, nothing in *Estep* v. *United States,* 327 U.S. 114 (1946), supports the conclusion

The Constitution therefore does not bar Congress from prohibiting the act of reentry itself.[17]

This case is not distinguishable from *Lewis* on the ground that the primary method for challenging deportation orders—through review by a court of appeals of a

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that review of the validity of the deportation proceeding must be permitted in prosecutions under Section 1326. The Court there noted that Congress had made "no provision in terms for judicial review" of the administrative action underlying the criminal prosecution (327 U.S. at 119) and concluded that Congress did not intend to bar any attack on that administrative action (*id.* at 121). Thus, contrary to respondents' claim (Br. in Opp. 5), the decision in *Estep* does not support the conclusion that collateral attack should be permitted here, since Congress provided for judicial review of deportation orders pursuant to Section 1105a. Moreover, the Court stated in *Estep* that "[w]e may assume that where only one judicial remedy is provided, it normally would be deemed exclusive." 327 U.S. at 125. Accordingly, in the case of deportation orders, review pursuant to Section 1105a would be assumed to be exclusive even if Section 1105a did not state that it is the "sole and exclusive" procedure for obtaining review of deportation orders.

[17] This Court applied similar analysis to an analogous problem in *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967). There, civil rights protesters sought to raise constitutional challenges to an injunction for the first time in criminal contempt proceedings for violation of the injunction. The Court held that the State could constitutionally bar the defendants from raising those challenges in the criminal contempt proceedings, on the ground that they could have raised the same challenges in the injunction proceeding. The defendants had no constitutional right, the Court ruled, to by-pass challenging the injunction and to raise their constitutional objections to the injunction in defending against the criminal contempt charges. The Court has applied the same principle in federal cases, noting that a contempt proceeding " 'does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy.' " *Sheet Metal Workers* v. *EEOC*, No. 84-1656 (July 2, 1986), slip op. 16 n.21, quoting *Maggio* v. *Zeitz*, 333 U.S. 56, 69 (1948); see also *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 439 (1976); *United States* v. *United Mine Workers*, 330 U.S. 258, 293 (1947).

final order of deportation (8 U.S.C. 1105a(a))—is a civil proceeding. In *Yakus* v. *United States*, 321 U.S. 414, 443-446 (1944), the Court upheld the Emergency Price Control Act against a similar constitutional challenge. That Act provided that a person subject to a maximum price regulation could challenge its validity only through a civil proceeding; a defendant could not challenge the validity of a maximum price regulation in a criminal proceeding for violating the regulation. The Court found no constitutional infirmity in that statutory scheme. In reaching that conclusion, the Court stated (321 U.S. at 444) that there is "no principle of law or provision of the Constitution which precludes Congress from making criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity." Respondents have failed to appeal their deportation order, so they have waived the right to challenge it after reentering this country.[18]

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[18] Respondents seek to distinguish *Yakus* (Br. in Opp. 5-6) by noting that it involved an exercise of rulemaking rather that adjudicative power. While that is so, it does not change the essential point, which is that Congress can constitutionally permit a jury to rely on the fact that a prior administrative order was violated, rather than requiring review of the administrative proceeding as part of the criminal prosecution. Moreover, there is *less* potential unfairness in basing a criminal prosecution on the violation of an adjudicative order rather than a rulemaking order. An adjudicative order is addressed to the particular individual charged with the violation, whereas a rulemaking order is more general, so that the individual charged with the violation of such an order is less likely to be aware of the terms of the order. In this case, of course, the two respondents were fully aware of the deportation orders against them, and they were apprised both that they could challenge those orders and that they would be subject to prosecution if they returned to the United States without permission and without challenging their deportation orders.

As the court concluded in *Gonzalez-Parra*, there is no constitutional principle requiring that "a deported alien who fails to invoke the procedures of 8 U.S.C. § 1105a be permitted to contest the factual basis for the deportation order after he has reentered the country." 438 F.2d at 699; accord *Petrella*, 707 F.2d at 67. For that reason, there is no need to avoid a difficult constitutional issue by construing Section 1326, contrary to its plain language, to require the government to prove as an element of the crime of unlawful reentry that the defendant was "lawfully" deported.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 85-2067 (6)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, *Petitioner*

v.

JOSE MENDOZA-LOPEZ AND
ANGEL LANDEROS-QUINONES

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

Whether a deportation order, which has not been subjected previously to judicial review, can be collaterally attacked in a 8 U.S.C. 1326 prosecution for the purpose of determining whether the order was entered in accordance with due process and was supported by substantial evidence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 781 F.2d 111. The opinion of the district court (Pet. App. 8a-26a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 1985. A petition for rehearing was denied on March 18, 1986 (Pet. App. 29a). On May 6, 1986, Justice Blackmun extended the time for filing a petition for a writ of certiorari to June 16, 1986. The petition for a writ of certiorari was filed on that date; the brief in opposition was filed on August 13, 1986. Writ of certiorari was granted on October 6, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. V provides:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

U.S. Const., amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

8 U.S.C. (1946 ed.) § 180 provided:

> **§ 180. Reentry or attempted reentry of deported alien; penalty; deported seamen as entitled to landing privileges**

(a) If any alien has been arrested and deported in pursuance of law, he shall be excluded from admission to the United States whether such deportation took place before or after March 4, 1929, and if he enters or attempts to enter the United States after the expiration of sixty days after said date, he shall be guilty of a felony and upon conviction thereof shall, unless a different penalty is otherwise expressly provided by law, be punished by imprisonment for not more than two years or by a fine of not more than $1,000 or by both such fine and imprisonment; *Provided*, That this section and sections 136, 154 and 180a-180d of this title shall not apply to any alien arrested and deported before March 4, 1929, in pursuance of law, in whose case prior to his reembarkation at a place outside the United States, or his application in foreign contiguous territory for admission to the United States, and prior to March 4, 1929, the Attorney General has granted such alien permission to reapply for admission.

(b) For the purposes of this section any alien ordered deported (whether before or after March 4, 1929) who has left the United States shall be considered to have been deported in pursuance of law, irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed. . . .

8 U.S.C. § 1326 provides:

Any alien who—

(1) has been arrested and deported or excluded and deported, and thereafter

(2) enters, attempts to enter, or is at any time found in the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for

admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be guilty of a felony, and upon conviction thereof, shall be punished by imprisonment of not more than two years, or by fine of not more than $1,000, or both.

8 U.S.C. § 1105a provides in pertinent part:

(a) * * * The procedure prescribed by, and all the provisions of chapter 158 of title 28 [review of orders of federal agencies] shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title [proceedings to determine deportability] or comparable provisions of any prior Act, except that—

* * * * *

(6) * * * if the validity of a deportation order has not been judicially determined, its validity may be challenged in a criminal proceeding against the alien for violation of subsection (d) or (e) of section 1252 of this title [supervision of deportable alien and penalty for willful failure to depart] only by separate motion for judicial review before trial * * *.

* * * * *

(9) any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

* * * * *

(c) An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order.

STATEMENT

1. Both respondents were apprehended in Lincoln, Neb. on October 23, 1984, by U.S. Immigration and Naturalization Service agents (INS agents). The respondents were processed in Omaha, Neb., some 60 miles from Lincoln. Processing included service of Orders to Show Cause; the orders stated a hearing would be held at a date and time "to be set." Attached to the show cause orders was a list of legal assistance available for the Omaha area.

On October 24th, they were flown 500 miles to Denver, Col. for detention prior to deportation proceedings. Neither respondent was served with notice of the date and time of their deportation hearing; they had not waived their right to the seven days notice required by 8 C.F.R. 242.1(b) (1984).

In a joint hearing on October 30, 1984, respondents and eleven other Mexicans were found deportable. None of the aliens were represented by counsel. At the hearing, both respondents requested that the Immigration Law Judge (ILJ) provide relief from the deportation order. Such relief was premised on the fact that each had continuously resided in the United States for more than seven years and had no prior criminal record. The ILJ acknowledged their eligibility to apply for suspension of deportation, but failed to act upon the requests. The ILJ signed an order finding the respondents to be deportable, and to have waived their rights to appeal. On October 31, warrants of deportation issued and respondents were bussed

to El Paso, Texas, a trip of 8-10 hours. On November 1, 1984, respondents were escorted across the border to Mexico.

2. On December 12, 1984, both respondents were arrested in Lincoln, Neb. They were indicted by the grand jury sitting in the District for Nebraska on charges of violating 8 U.S.C. § 1326.

On Feb. 7, 1985, respondents timely filed pretrial motions requesting pretrial judicial review of their deportation proceedings, and dismissal of the indictments against them. Alternatively, respondents moved to suppress and exclude all evidence relative to the deportation orders of Oct. 30, 1984. On Feb. 22, 1985, the U.S. District Court for the District of Nebraska dismissed the indictments.

The memorandum opinion supporting the dismissal order found that pretrial judicial review was available to challenge a prior administrative order that represented a material element of a criminal charge. The court noted the strong dissent by Justices Jackson and Frankfurter in *U.S.* v. *Spector*, 343 U.S. 169 (1952), which stated that an alien "[s]tands on equal constitutional footing with the citizen when he is charged with crime. If Congress can subdivide a charge against an alien and avoid just trial by submitting the vital and controversial part of it to administrative decision, it can do so in the prosecution of a citizen." *Spector*, supra, at 178. The district court also found persuasive the reasoning of the Third, Seventh and Ninth Circuits that allowed collateral attacks on a deportation order. (Pet. App. at 18a). These circuits require that a governmental action be done according to law to be valid. They further state that, for the purposes of 8 U.S.C. § 1326, a deportation must be "a lawful deporta-

tion." *U.S.* v. *Gasca-Kraft*, 522 F.2d 149, 152 (9th Cir. 1975). See also *U.S.* v. *Bowles*, 331 F.2d 742 (3d Cir. 1964); *U.S.* v. *Rosal-Aguilar*, 652 F.2d 721, 723 (7th Cir. 1981).

The district court then found that after reviewing respondents' deportation proceedings, it was "left with the distinct impression that substantial justice was not done." (Pet. App. at 26a). In a detailed factual finding, Judge Urbom stated that the respondents had been denied due process by the ILJ's failure to provide a hearing that was fundamentally fair. It was "inconceivable that they [the respondents] would so lightly waive their rights to appeal, and thus to the relief they now claim entitlement, if they had been fully apprised to the ramifications of such a choice." (Pet. App. at 23a) The swift expulsion of the respondents from this country following their hearing barred any further appeals, even though they were still well within the ten days allowed to appeal the administrative order. Expulsion also interrupted "their prior continuous stay in the United States so as to make them seemingly now ineligible for suspension of deportation." (Pet. App. at 24a)

The district court stated that it "reviewed the tape recording of the hearing held before the Immigration Law Judge on October 30, 1984. In addition, I have compared the hearing tape with the unofficial transcript provided by defense counsel." (Pet. App. at 19a) The tapes were stipulated into the record, and available to this court for review. (D.Ct. Record, filing no. 22) They were not transcribed. The unofficial transcript was an appendix to the brief in support of the motions, and was not made a part of the record.

3. The court of appeals affirmed, stating that "[A]llowing a pretrial review of the underlying deporta-

tion to examine whether due process was provided ensures fundamental fairness to the rights of the criminal defendant." *United States* v. *Mendoza-Lopez*, 781 F.2d 111, (8th Cir. 1985). The opinion specifically found that *Lewis* v. *United States*, 445 U.S. 55 (1980) was inapplicable to the facts at hand. The prior decision in Lewis which that defendant sought to collaterally attack was judicial, not administrative. The court of appeals further found that the district court had correctly ruled that the ILJ did not clearly or adequately inform the respondents of the consequences of the choices they were forced into making. A dissent was entered by Judge Fagg, stating his belief that 8 U.S.C. § 1105A provides the "sole and exclusive" method for obtaining judicial review of deportation orders.

SUMMARY OF ARGUMENT

Essential to the principle of fundamental fairness is the right to due process of law, particularly where loss of liberty is at stake. The facts of this case clearly establish that the Immigration and Naturalization Service (hereinafter I.N.S.) ran roughshod over the respondents' rights, ignoring not only fundamental fairness in its deportation procedures, but also its own regulations of notice and relief. The culmination of this gross miscarriage of justice was the I.N.S.'s swift expulsion of the respondents from this country, well within their time to appeal. The issue of whether the respondents could still challenge the 1984 deportation through the appropriate civil channels is not an issue in this criminal case. Whether the I.N.S. can insulate its actions from any judicial review of its administrative orders by its own bad acts is the question raised in this matter.

1. The lower courts were correct in allowing pretrial scrutiny of the administrative deportation order and in

finding the respondents were materially harmed by due process violations in their deportation. Judicial review of the proceedings underlying the order of deportation provides for a proper balancing of individual and governmental interests. It provides the least intrusive forum for protecting these interests, while preserving the constitutional integrity of the § 1326 proceedings. Prior unreviewed administrative orders should not be deemed conclusive upon the jury in a criminal trial. *U.S.* v. *Spector*, 343 U.S. 169, 179 (1952) (Jackson J., dissenting.)

2. Collateral attack in a Section 1326 prosecution does not provide another avenue for appeals by aliens seeking delay of their deportation orders. It is beyond question that the only persons who would have standing to utilize it would be aliens who had actually departed pursuant to an order of deportation. The effect of the review also does not set aside the deportation, except for purposes of criminal prosecution for illegal reentry.

The facts of this case demonstrate why collateral attack should and must be available to prevent a grave injustice. It is inequitable to exempt civil deportation hearings from the strict due process requirements of criminal prosecutions and then permit the government to "turn around and use the result as a conclusive determination of [deportability] in a criminal proceeding." *Spector* at 179.

3. An administrative ruling should not be allowed to supercede the right of the jury to determine all elements of a criminal offense. In *Estep* v. *U.S.*, 327 U.S. 114 (1964), this Court held that the validity of an administrative order could be reviewed when the order became the foundation for a criminal charge. To deny such a review would be to deny the defendant the opportunity to prove the nonexistence of an essential element of the crime with which he

was charged. See also *McKart* v. *U.S.*, 395 U.S. 185 (1969).

4. Analysis of 8 U.S.C. § 1326 and its legislative history indicates Congress intended to allow collateral attacks. The Congressional record and legislative history of Section 1326 is examined in detail in the *Amicus Curiae* briefs.

The purpose in enacting 8 U.S.C. § 1105(a) was to consolidate review of deportation orders in a single forum. It also was hoped it would abbreviate the process of judicial review, and frustrate dilatory tactics to delay departures of aliens ordered deported. *Cheng Fan Kwok* v. *I.N.S.*, 392 U.S. 206 (1968). Such a policy is not applicable to persons charged under § 1326, who have already departed.

ARGUMENT

A DEPORTATION ORDER NOT PREVIOUSLY SUBJECTED TO JUDICIAL REVIEW CAN BE COLLATERALLY ATTACKED IN A 8 U.S.C. § 1326 PROSECUTION. THE REVIEW IS TO DETERMINE WHETHER THE ORDER WAS ENTERED IN ACCORDANCE WITH DUE PROCESS AND WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. Collateral Attack Of The Underlying Deportation Order Is Essential To Protect The Constitutionality Of Criminal Proceedings Under Section 1326.

Possible constitutional infirmities arise if Section 1326 is interpreted to bar the trial court from examining the validity of the deportation. There is unfairness in exempting deportation hearings from the strict due process requirements of criminal prosecutions because of their civil nature, while allowing the government to,

> "turn around and use the result as a conclusive determination of [deportability] in a criminal proceeding."

U.S. v. *Spector*, 343 U.S. 169, 179 (1952) (Jackson J., dissenting)

It is undisputed that deportations are civil in nature, and the various protections that trigger in a criminal context are inapplicable. *I.N.S.* v. *Lopez-Mendoza*, 468 U.S. ____, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984). Unlike the criminal standard of proof a deportation hearing requires only that deportability be "found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true." 8 C.F.R. § 242.14 (1984).

As occurred in this case, allowing a pretrial review of the underlying deportation insured fundamental fairness to the criminal defendants. Here, the respondents were initially arrested and ultimately expelled from the country within a seven day period. They also had no notice of the deportation hearing which was held 500 miles from their homes. When they sought discretionary relief, their requests were met with laughter, and they were bussed off to the border. The record also shows that both respondents were unfamiliar with the legal process, and unrepresented by counsel. (D.Ct. Record, no. 22, cassette recordings).

The facts of this case graphically illustrate the necessity for permitting review of the underlying deportation order. In *Estep* v. *U.S.*, 327 U.S. 114 (1946), this Court allowed examination of an underlying administrative order for procedural violations, stating, "[w]e cannot believe that Congress intended that criminal sanctions were to be applied . . . no matter how flagrantly they violated the rules and regulations which define their jurisdiction." *Estep.* at 119. *Estep* is applicable to the facts herein because there are no other avenues of relief for the respondents. All avenues were closed within 48 hours of

their deportation when they were escorted across the border. 8 U.S.C. § 1105a(c)

Support for allowing a collateral attack of an administrative order is also found in *McKart* v. *U.S.*, 395 U.S. 185, 197 (1969). Although not expressly permitted by statute, a judicial review was ruled to be an appropriate balancing of individual and governmental interests.

Yakus v. *U.S.*, 321 U.S. 414 (1944), another war time case, is distinguishable from the present case. It involves an exercise of rulemaking power, not the adjudicative powers of the I.N.S. Therefore, a different scope of review mandated by the due process clause applies. *Yakus*-type determinations are akin to delegated legislative authority, and are subject only to an examination for constitutionality. A deportation hearing, by its judical nature, is measured against procedural safeguards for the equitable treatment of individuals. Furthermore, respondents herein did not challenge the constitutionality of the law itself; the challenge was to the procedure of their deportation, which was in contravention to the I.N.S.'s own regulations.

Petitioner asserts that *Lewis* v. *U.S.*, 445 U.S. 55 (1980) forecloses objections of constitutionality in this matter. The district court did not find *Lewis* controlling for several reasons. One, the policies behind the two criminal statutes are vastly disparate. Secondly, *Lewis* involved a prior judicial proceeding with the higher burden of proof accorded a criminal proceeding.

Whether an administrative decision can be attacked collaterally when the decision becomes a material element in a criminal proceeding under Section 1326 has varied drastically from circuit to circuit. The court of appeals documented this split in its opinion. (Pet. App. at 3a-4a)

The differences in view appears to center on a presumption in the Third, Ninth, Seventh and Eighth Circuits that an act of a governmental agency should be in accordance with the law. The expectation that a deportation order be lawful if it is to form the basis for criminal sanctions avoids potential constitutional problems. As reasoned in *U.S.* v. *Bowles*, 331 F.2d 742 (3d Cir. 1964),

> "Back of a deportation lies the deportation warrant and back of the warrant lies an order of deportation which in turn is bottomed upon a deportation hearing held in accordance with law." *Bowles* at 749.

See also *U.S.* v. *Rosal-Aguilar*, 652 F.2d 721, 723 (7th Cir. 1981); *U.S.* v. *Gasca-Kraft*, 522 F.2d 149, 152 (9th Cir. 1975).

Spearheading those circuits that have rejected the doctrine of collateral attack (Second, Fifth, and Tenth) is the case of *U.S.* v. *Gonzalez-Parra*, 438 F.2d 694 (5th Cir. 1971). This case held that re-litigation of the merits of a deportation hearing is barred by Section 1105a, and that a defendant who fails to pursue the statutory administrative remedies cannot later challenge the order in a Section 1326 proceeding. Such a reading of Section 1326 would have had unconscionable results if applied to this case. The respondents' inability to understand the consequences of their choices, including their need to appeal, were found to have caused them substantial harm. This finding was upheld by the Eighth Circuit Court of Appeals (Pet. App. at 4a)

It is important to note that permitting a review of the deportation order is just the threshold step for the movant-defendant. It must also be shown that a violation of constitutional rights occurred. Here, the district court found that there was a serious question as to whether the

respondents were adequately heard, or whether they understood the consequences of their choices. Judicial review provided a proper balancing of individual and governmental interests under the Constitution. The alien would only receive one judicial review of the deportation, which imposes only a minimal burden on the I.N.S. and courts. Preclusion of the review in a Section 1326 prosecution "may result in an unjustified prison term of two years, a result that offends fundamental fairness." "Collateral Attacks on Deportation Orders," 50 BROOKLYN L. REV. 721 (Spring, 1984)

B. Judicial Review To Ascertain Whether A Deportation Order Is Supported By Substantial Evidence, And Entered In Accordance With Due Process, Is Consistent With The Immigration Code.

The legislative history of 8 U.S.C. § 1326 reveals no bar to a collateral attack on the lawfulness of a deportation order. The House and Conference Report, a document of some one hundred odd pages, contained the following reference to Section 1326: "criminal sanctions are provided for entry of an alien at an improper time or place, for misrepresentation and concealment of facts, *for reentry of certain deported aliens . . .*" *Immigration and Nationality Act*, H.R. No. 1365, 82nd Cong., 2d Sess., U.S. Code Cong. and Admin. News, p. 1653 (1952) (emphasis added). While it is true that the House Report printed Section 1326 in a column next to one of its predecessors, 8 U.S.C. (1942) § 180, this only further contrasts the differences in the two laws. Section 180 contained the criminal provision for reentry after a deportation pursuant to law; Section 180 also contained several other sections concerning alien seamen and voluntary departures. H. R. Rep. 1365, 82nd Cong., 2d Sess. 219-220 (1952).

While Section 1326 makes it clear that unauthorized reentry was punishable as a crime, it is not clear that the deportation order can be "unlawful" for the purposes of the act. It is unlikely Congress intended to allow a constitutionally tainted administrative order to be unchallengable in a later criminal action. Furthermore, Congress is bound by the Constitution. The Fifth Amendment provides that "no *person* shall . . . be deprived of life, liberty, or property, without due process of law . . ." (Emphasis added). This encompasses all persons, including all aliens. *Plyler* v. *Doe*, 457 U.S. 202, 210 (1982); *Wong Wing* v. *U.S.*, 163 U.S. 228, 238 (1896). Despite petitioner's contentions about *Yakus* and *Lewis*, it is inconceivable a U.S. citizen, faced with a similar unjust administrative order, would be barred from having that order examined minimally for procedural due process in a later criminal sanction.

Troubling questions also arise whenever an issue is removed from the consideration of the jury. The Sixth Amendment right to a jury is even further compromised if that administrative order has never been judicially reviewed.

8 U.S.C. § 1105a was intended to unify the procedures for appealing deportation decisions. Its language shows that due process considerations were a factor in its conception. Its legislative history indicates its main purpose was to reduce dilatory appeals by persons ordered deported who wanted their departure delayed. Any defendant in a Section 1326 prosecution is going to fall outside of that purpose, as they will have had to leave to reenter. Section 1252 is the civil deportation proceeding statute. Criminal sanctions are not its primary purpose.

The scope of the collateral attack/judical review in Section 1105a differs from the level at judicial review con-

ducted in this case. A successful attack of a deportation order under Section 1105a would affect the actual deportation order, either by remand or dismissal. Some affirmative relief would be granted the alien who had remained within the U.S. borders.

The only result of the successful collateral attack in the present case was dismissal of the criminal indictments. Respondents still have a deportation on their immigration records which would require a waiver by the Attorney General. A new tactic in delaying actual deportation has not been created. The "sole and exclusive" provision has not been violated.

The district court reviewed the deportation proceedings for violations of procedural due process. This was done pursuant to defense motions to judically review, or, alternatively, to suppress the orders which were entered in contravention of respondents' due process rights. A *de novo* review of the facts was not requested or ruled on by the lower courts. A procedural review of the underlying order is clearly allowed in criminal litigation under a motion to exclude and suppress. Under the facts of this case, barring such a review would raise serious constitutional questions. The district court found that the respondents had demonstrated a "substantial likelihood that the result of the [deportation] hearing would have been materially affected," had the ILJ fully complied with the provisions of 8 C.F.R. § 242.17 (Pet. App. at 25a). The court also found that the swift execution of the warrant of deportation also affected respondents right to file for suspension of deportation or to appeal the order. Specifically, the court found that "the tape recording of the deportation hearing itself demonstrates amply that these defendants did not understand the consequences of the choices they were forced to make (Pet. App. at 25a) and

that "substantially justice was not done." (Pet. App. at 25a). Under the government's restrictive interpretation of § 1326, this limited judicial review would have been unavailable. A gross miscarriage of justice has been avoided by the district court's interpretation, and the Court of Appeals affirmance of the district court's order.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

JOSE MENDOZA-LOPEZ AND
ANGEL LANDEROS-QUINONES

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. In our opening brief, we argued that the courts of appeals that have permitted collateral attacks on the validity of deportation proceedings in criminal prosecutions under 8 U.S.C. 1326 have simply read the word "lawfully" into the statute. In our view, Congress enacted Section 1326 to criminalize the act of reentering the United States following deportation. The language of Section 1326, which does not mention the lawfulness of the deportation, is inconsistent with allowing collateral review of the deportation proceedings in criminal prosecutions. In support of that contention, we noted that Section 1326 was based on 8 U.S.C. (1946 ed.) 180, which provided for two years' imprisonment and the exclusion of "any alien * * * arrested and deported in pursuance of law, * * * [who] enters or attempts to enter the United States." We pointed out that the fact that Congress deleted the phrase "in pursuance of law" when it

enacted Section 1326 confirms that Congress did not intend to permit the underlying deportation proceedings to be subject to collateral review.

Amicus American Civil Liberties Union (ACLU) draws a different conclusion from the legislative history of Section 1326. The ACLU notes that prior to the enactment of Section 1326 in 1952, three statutes other than Section 180 prohibited reentry by deported aliens: 8 U.S.C. (1946 ed.) 137(h) provided that deported anarchists who returned were subject to deportation and to five years' imprisonment; 8 U.S.C. (1946 ed.) 138 provided that aliens who returned after being deported in connection with prostitution offenses were subject to two years' imprisonment; and 8 U.S.C. (1946 ed.) 155(a) provided that a variety of "undesirable aliens," including aliens who returned after being deported, were deportable. According to the ACLU, "[t]he case law allowing collateral attack under the predecessor statutes to Section 1326 is considerable" (Br. 12), and Congress did not intend to overturn that "long-established legal principle[ ]" (Br. 18) by enacting the "more succinct" (Br. 21) language of Section 1326. This argument is flawed in several respects.

Contrary to the ACLU's assertion, there was no clear right to collaterally attack the validity of deportation proceedings under the predecessor statutes to Section 1326. The ACLU acknowledges that in *United States ex rel. Koehler* v. *Corsi*, 60 F.2d 123 (2d Cir. 1932), the court rejected an argument that it should collaterally review a prior deportation order in a proceeding under Section 180, stating that "it is now too late to attack that deportation as one not in pursuance of law" (60 F.2d at 123). The two cases the ACLU cites besides *Corsi* that involved Section 180 do not establish any clear right to collateral attack. In *United States ex rel. Bartsch* v. *Watkins*, 175 F.2d 245, 247 (2d Cir. 1949), the court did not decide whether collateral

review was warranted, concluding instead that "it is unnecessary to determine the validity of the 1946 deportation" justifying the deportation at issue. In *United States ex rel. Rubio* v. *Jordan*, 190 F.2d 573, 575-576 (7th Cir. 1951), the court stated that "valid reasons are assigned for not permitting such collateral attacks on former deportation proceedings" unless the court is convinced that there was a gross miscarriage of justice in those proceedings. The court in *Jordan* went on to state that "[h]ere we find no such gross miscarriage of justice in the former deportation proceedings as would justify our review of those proceedings" (*id.* at 576). Thus, the three cases construing Section 180 hardly support the proposition that collateral attacks were permissible under that provision, even though that provision applied only when an alien had previously been deported "in pursuance of law." Rather, one of the cases held that collateral attack was not permissible, one of the cases did not decide the issue, and the remaining case stated that collateral attack was available only in exceptional circumstances involving a gross miscarriage of justice.*

The cases involving statutes other than Section 180 also do not support the ACLU's claim that prior to the enactment of Section 1326 there was a clearly established right to collaterally attack deportation orders. In *United States ex rel. Steffner* v. *Carmichael*, 183 F.2d 19, 20 (5th Cir.), cert. denied, 340 U.S. 829 (1950), a case decided under Section 155(a), the court merely suggested that in the event of a gross miscarriage of justice it might review a prior deportation order. The court went on to state that "[e]ven if we were

---

*A rule that collateral attack is permissible to correct a gross miscarriage of justice would not help respondents. The irregularity identified by the district court was that, while technically complying with regulations requiring that he notify respondents of their eligibility to apply for suspension of deportation, the immigration judge did not adequately explain that option to them (Pet. App. 22a-23a).

to concede that we should examine the order entered in his 1936 deportation proceeding, appellant would not be in any better position than he is now, because we are of the opinion that such order was valid when entered" (183 F.2d at 21). In *United States ex rel. Beck* v. *Neelly*, 202 F.2d 221 (7th Cir.), cert. denied, 345 U.S. 997 (1953), also a Section 155 case, the court did not decide whether prior deportation proceedings were subject to collateral attack. The court cited *Carmichael* and *Corsi*, and it prefaced its rejection of the alien's claim that his prior deportation proceeding was unlawful by expressly declining to decide whether "petitioner may collaterally attack the record of previous deportation proceedings" (202 F.2d at 222 & n.1). In prior proceedings in that case, the Board of Immigration Appeals had quoted *Corsi* in support of its conclusion that " 'it is now too late to attack that deportation as one not in pursuance of law' " (*In re P*, 3 I. & N. Dec. 818, 820 (1949)). Finally, in *Mills* v. *United States*, 273 F. 625, 626 (9th Cir. 1921), a case decided under Section 138, the court rejected an alien's challenge to the prior deportation order that formed the basis for the alien's subsequent indictment for returning to this country after having been deported for prostitution. While the court in that case reviewed the validity of the deportation order, it did not consider whether the statute permitted such collateral attack, an issue that apparently was not raised.

In short, the state of the law in 1952 does not support the ACLU's assertion that "[t]he case law allowing collateral attack under the predecessor statutes to Section 1326 is considerable" (Br. 12), and that permitting such collateral attacks was a "long-established legal principle[ ]" (Br. 18). One court had held that collateral review was not warranted, and the Board of Immigration Appeals had agreed with that view; two courts had discussed but not decided the issue; another court had rejected a claim that a prior deportation was invalid without considering whether collateral

attack was warranted; and, as we stated in our opening brief (at 13 n.10), two courts had suggested that collateral attack might be warranted to remedy a gross miscarriage of justice. That is hardly a "considerable" body of case law demonstrating a "long-established legal principle" authorizing collateral attack on the validity of deportation orders.

The ACLU next distorts the legislative history by claiming that when it enacted Section 1326, Congress intended "that existing law 'be substantially reenacted,' with only superficial changes" (Br. 20, quoting S. Rep. 1515, 81st Cong., 2d Sess. 656 (1950)). The ACLU's quotation is taken from a report issued two years before Section 1326 was enacted, not at the time of the enactment of Section 1326. More importantly, it was the judicial and administrative penalties that the report recommended be "substantially reenacted," not "the existing law." Thus, even if there were a considerable body of case law establishing a right to collateral attack, the legislative history does not indicate that Congress intended to carry forward that body of law; it merely indicates that Congress meant to carry forward the penalties for reentry following deportation.

The ACLU's explanation of how Congress happened to delete the phrase "in pursuance of law" is fanciful. According to the ACLU, Congress did not intend anything by the change—Congress "simply used the more succinct language of Section 155 for the new felony provision" (Br. 21). In fact, if Congress had wanted to be more succinct, yet retain language suggesting that collateral attack was permissible, it could have replaced the phrase "in pursuance of law" with the single word "lawfully." It did not. The obvious inference to be drawn from Congress's deletion of the phrase is that Congress did not intend to permit collateral attacks on

the validity of prior deportation proceedings in criminal prosecutions for reentering the United States after having been deported.

Moreover, the evidence is clear that it was Section 180, not Section 155, that served as the model for the present Section 1326. As we noted in our opening brief (at 14 n.12), the House Report on the Immigration and Nationality Act of 1952 printed Section 180, not Section 155, next to Section 1326 in comparing the "existing law" to "the proposed law." And it is simply not true that the language of Section 1326 "tracks" the language of Section 155, as the ACLU asserts (Br. 21). In making that claim, the ACLU is referring to the phrase "excluded and deported or arrested and deported," which appears in both statutes. However, the phrase appeared in Section 155(a) as the 345th through 351st words of the statute. A cursory examination of that statute, which is anything but succinct, and which was not a criminal statute, shows that it plainly was not the model for Section 1326.

2. We also noted in our opening brief that 8 U.S.C. 1105a(a) provides the "sole and exclusive procedure for * * * judicial review of all final orders of deportation." That provision supports the view that deportation orders are not subject to collateral attack in criminal prosecutions under Section 1326. That conclusion is further reinforced by Section 1105a(c), which provides that an "order of deportation or of exclusion shall not be reviewed by any court if the alien * * * has departed from the United States after the issuance of the order."

Respondents (Br. 14-15) and the ACLU (Br. 22-31) argue that the legislative history shows that when it enacted Section 1105a, Congress was focusing on the problem of deportation delays. In their view, this Court should therefore hold that what Congress clearly stated in Section 1105a should

not apply to prosecutions brought under Section 1326. That response is inadequate. The plain language of the statute may not be ignored on the ground that the legislative history indicates that Congress was principally concerned with addressing a somewhat different problem.

The ACLU also argues (Br. 27-28) that it would be anomalous to permit collateral attacks in prosecutions for failing to leave the country after being ordered to depart and not to permit collateral attacks in prosecutions for returning after being deported. There is no anomaly. As we noted in our opening brief (at 17 n.14), there are at least two reasons why Congress might have intended to permit collateral attacks in the one case and not in the other. Collateral attack in cases involving aliens who have not departed may be justified because those aliens may be unable to find a country that would accept them, a point discussed by the dissenters in *United States* v. *Spector*, 343 U.S. 169, 179-180 (1952). Collateral attack in "failure to depart" cases may be justified because, in general, there will be a much longer delay between the issuance of a deportation order and a prosecution for unlawful reentry than there will be between the issuance of a deportation order and a prosecution for failure to depart. Allowing collateral attack in reentry cases is therefore likely to pose much more serious practical problems. The ACLU ignores both of those reasons that would justify permitting collateral attacks in prosecutions under 8 U.S.C. 1252(d) and 8 U.S.C. (Supp. III) 1252(e), while precluding such collateral attacks in prosecutions under Section 1326.

3. Respondents primarily argue that fundamental fairness requires that they be permitted to collaterally attack the validity of their deportation proceedings. In particular, they repeatedly complain (Br. 6, 7, 10-11, 15) that they had no realistic opportunity to challenge their deportation orders because they were escorted across the border two days after their deportation hearing. However, respondents

do not deny that, in response to the immigration judge's question, they waived their right to appeal (Pet. App. 22a-23a). It is not clear what respondents think the Immigration and Naturalization Service ought to do with aliens ordered deported who waive their right to appeal. It seems clear that it is in everyone's interest to deport them promptly. To be sure, it would be unfair to deport an alien before the time to appeal had run and before the alien had decided whether to appeal. Once an alien waives his right to appeal, however, neither he nor the government benefits from delaying the deportation. In that circumstance, it would seem more troubling to hold the alien in custody rather than to deport him promptly.

Amicus American Immigration Lawyers Association (AILA) has submitted a brief that documents the obvious fact that deportation proceedings are not criminal proceedings. Like respondents (Br. 9-10) and the ACLU (Br. 31-41), the AILA contends (Br. 26) that it is unfair to permit "an element of a crime to be conclusively established in an administrative proceeding." They fail to recognize that, as we explained in our opening brief (at 21), the elements of the crime prohibited by Section 1326, are (1) reentry into the United States, (2) without the Attorney General's permission, (3) after having been deported. Thus, Congress has criminalized the act of reentry by a previously deported alien. It has not made being a deportable alien—the matter at issue in the administrative proceeding—an element of the crime.

Moreover, as we explained in our opening brief (at 21-23), this Court has held that it is permissible for Congress to prohibit a defendant from challenging the validity of an administrative regulation in a criminal prosecution for violating the regulation (*Yakus* v. *United States*, 321 U.S. 414, 443-446 (1944)) and to prohibit a defendant prosecuted for possessing a firearm after a felony conviction from challenging the validity of the prior felony conviction (*Lewis* v.

United States, 445 U.S. 55, 67 (1980)). This Court has indicated that a different rule might apply if the defendants did not have the opportunity to challenge the prior determination. But respondents had the opportunity to appeal their deportation order, and they waived it. They also had the opportunity to obtain the Attorney General's permission to reenter, but they did not attempt to obtain it. Neither respondents nor amici have advanced any sound reason why Congress cannot make criminal the act of reentry following deportation and prohibit collateral attack on the validity of the deportation order when the defendants had such opportunities and did not take advantage of them.

For these reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

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In The

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v.

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ANGEL LANDEROS-QUINONES,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF AMICUS CURIAE AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST

The American Immigration Lawyers Association is a national organization of practicing lawyers and law school professors who practice and teach in the fields of immigration and nationality law. The Association has a direct and serious interest in the development of immigration and nationality law and in the case presently before the Court. The availability of the opportunity to raise the unlawfulness of the underlying deportation order as a defense to a criminal charge of reentry after deportation under § 276 of the Immigration and Nationality Act directly affects many of the Association's members and clients. The Association submits this brief in support of the position of re-

spondents. The focus of this brief is on the lack of procedural safeguards in deportation proceedings, a subject that is within the particular expertise of the Association and which complements the brief of respondents. All parties have consented to the filing of the brief.

I.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case squarely presents the issue left open in *United States v. Spector*, 343 U.S. 169, 172-73 (1952): Whether an alien in a criminal proceeding can collaterally attack the validity of the underlying deportation order where the prior deportation is an element of the offense. The petitioner's position, that the government may rely on an administrative finding to conclusively establish a criminal violation, raises significant questions regarding the level of due process which should be afforded to aliens and citizens alike in criminal proceedings. *See Spector*, 343 U.S. at 177 (Jackson, J., dissenting).

Deportation is a civil proceeding and thus the protections afforded to the criminal defendant are not available. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984). The alien has limited fourth, fifth, and sixth amendment rights and the government must meet a lower standard of proof. *Id.* Although a deportation hearing must comport with fundamental fairness, the level of due process required is minimal.

Even this minimal level of due process is frequently violated in deportation proceedings. The immigration

courts face the pressure of a tremendous caseload. In deportation hearings, aliens are often denied their right to due process because of their own lack of understanding of the proceedings, the unavailability of counsel, and the pressures of representing themselves in mass hearings.

The use of a deportation order to conclusively determine a material element of a criminal offense denies fundamental fairness because the level of due process afforded in deportation hearings would never withstand scrutiny in a criminal setting. Contrary to the government's assertion, this case is not controlled by either *Lewis v. United States*, 445 U.S. 55 (1980), or *Yakus v. United States*, 321 U.S. 414 (1944). This Court should hold, as it did in *Estep v. United States*, 327 U.S. 114, 122 (1946), that it "... cannot readily infer that Congress departed so far from the traditional concepts of a fair trial when it made the [administrative decision] 'final' as to provide that a citizen of this country should go to jail for not obeying an unlawful order of an administrative agency."

II.

ARGUMENT

In a criminal prosecution for reentry after deportation or exclusion in violation of § 276 of the Immigration and Nationality Act (hereinafter "the Act"), 8 U.S.C. § 1326 (1980), an essential element of the crime is that the alien has been previously deported or excluded. Petitioner's argument that the accused may not raise as a defense

the unlawfulness of the previous deportation or exclusion order presents the question whether a trial court may rely on an administrative finding of deportability to conclusively prove guilt in a criminal prosecution.

In *United States v. Spector*, 343 U.S. 169, 172-73 (1952), this Court expressly reserved decision on this issue because it had not been raised or briefed. Justice Jackson, however, discussed the importance of the issue in dissent:

> [W]e must not forget that, while the alien is not constitutionally protected against deportation by administrative process, he stands on an equal constitutional footing with the citizen when he is charged with crime. If Congress can subdivide a charge against an alien and avoid jury trial by submitting the vital and controversial part of it to administrative decision, it can do so in the prosecution of a citizen. And if vital elements of a crime can be established in the manner here attempted, the way would be open to effective subversion of what we have thought to be one of the most effective constitutional safeguards of all men's freedom.

Spector, 343 U.S. at 177-78 (Jackson, J., dissenting).

The circuit courts which have addressed the question of the ability to collaterally attack a deportation order in a § 276 proceeding are split on the issue. The Second, Fifth, and Tenth Circuits have taken the restrictive view that collateral attack is not required by statute or by the Constitution. *See United States v. Petrella*, 707 F.2d 64, 66 (2d Cir.), *cert. denied*, 464 U.S. 921 (1983); *United States v. Gonzalez-Parra*, 438 F.2d 694, 697-99 (5th Cir.), *cert. denied*, 402 U.S. 1010 (1971); *Arriaga-Ramirez v. United States*, 325 F.2d 857, 859 (10th Cir. 1963). On the

other hand, in addition to the Eighth Circuit in the case on review, the Third, Seventh, and Ninth Circuits have permitted varying degrees of collateral review of deportation orders. *See United States v. Nicholas-Armenta*, 763 F.2d 1089, 1090 (9th Cir. 1985) (allowing defendant to attack legality of deportation); *United States v. Rosal-Aguilar*, 652 F.2d 721, 723 (7th Cir. 1981) (affirming denial of de novo hearing on merits of deportation, but approving review insofar as the "Government must prove the underlying deportation to have been based on a valid legal predicate and obtained according to law"); *United States v. Bowles*, 331 F.2d 742, 750 (3d Cir. 1964) (allowing collateral attack on both factual and legal grounds).

We, as amicus curiae, urge this Court to adopt the view of the Eighth, Ninth, Seventh, and Third Circuits permitting collateral review of deportation proceedings. Permitting such review is a necessary safeguard to the due process rights of both aliens and citizens because the level of due process afforded to aliens in deportation proceedings is minimal, contrasting markedly with the panoply of safeguards provided for the criminal defendant, and because even this minimal level of due process is frequently violated in deportation proceedings. The use of an agency determination of deportability arrived at through procedures which would never survive scrutiny in the criminal context to conclusively establish a material element of a § 276 criminal offense violates the criminal defendant's right to due process of law.

A. The Level of Due Process Afforded to Aliens in Deportation Proceedings is Minimal.

The courts have long held that a deportation proceeding is purely civil in nature and that therefore the procedures and safeguards associated with criminal prosecutions are inapplicable. *See INS v. Lopez-Mendoza,* 468 U.S. 1032, 1038 (1984); *Harisiades v. Shaughnessy,* 342 U.S. 580, 594 (1952); *Bilokumsky v. Tod,* 263 U.S. 149, 154 (1923), *overruled on other grounds, INS v. Lopez-Mendoza,* 468 U.S. 1032 (1984). In contrast to the full array of constitutional protections applicable to criminal prosecutions, deportation hearings are administrative proceedings which must only comply with the lesser standard of "fundamental fairness". *See Bridges v. Wixon,* 326 U.S. 135, 154 (1945); *The Japanese Immigrant Case,* 189 U.S. 86, 100 (1903).

At issue in this case is not whether the procedures provided in a deportation proceeding meet the standards of the due process clause of the fifth amendment to support a civil order of deportation, but rather whether those procedures are sufficient to establish a criminal conviction. The abbreviated administrative procedure for establishing deportability as described below contrasts sharply with the procedure mandated for criminal conviction. It is this absence of procedural safeguards in the deportation process that causes the deportation order to lack the certainty required to prove an element of a criminal conviction.

1. The Lack of Pre-hearing Protections in Deportation Proceedings

From the moment that a person suspected of being an alien first encounters the Immigration and Naturaliza-

tion Service (hereinafter "INS"), he or she is subjected to a process that bears little resemblance to the strictly prescribed procedures for the criminally accused. At the time of arrest, suspected illegal aliens are not informed of their right to remain silent, that any information that they give to the INS will be used against them to prove deportability, nor of the right to be assisted by counsel. INS regulations require only that these warnings be given after INS agents have gathered sufficient information to begin deportation proceedings. 8 C.F.R. § 287.3 (1986). The courts have held that the procedures mandated by *Miranda v. Arizona,* 384 U.S. 436 (1966), are not required in deportation cases. *United States v. Alderte-Deras,* 743 F.2d 645, 647 (9th Cir. 1984); *Avila-Gallegos v. INS,* 525 F.2d 666, 667 (2d Cir. 1975).

Nor does the suspected illegal alien have the right to the presence of counsel during preliminary interrogation as is guaranteed in the criminal context by *Massiah v. United States,* 377 U.S. 201 (1964) and *Escobedo v. Illinois,* 378 U.S. 478 (1964). *See Lavoie v. INS,* 418 F.2d 732, 734 (9th Cir. 1969), cert. denied, 429 U.S. 1044 (1977). See also *Nai Cheng Chen v. INS,* 537 F.2d 566, 569 (1st Cir. 1976) (statement of alien admissible although INS refused to notify previously-retained counsel). The Act only requires that the alien be advised of his right to counsel at the actual deportation hearing. 8 U.S.C. § 1252(b)(2) (1980); *see also Castaneda-Delgado v. INS,* 525 F.2d 1295, 1298 (7th Cir. 1975).

Persons in INS custody awaiting a deportation hearing have no right under the eighth amendment to the Constitution to be released on bail. *Carlson v. Landon,* 342

U.S. 524 (1952). Nor does the sixth amendment right to a speedy trial apply to deportation proceedings. *Argiz v. U.S. Immigration Service*, 704 F.2d 384, 387 (7th Cir. 1983).

2. Lack of Procedural Safeguards in the Deportation Hearing

The finding of deportability is made in a civil, administrative hearing. Because it is civil instead of criminal, and because it is administrative instead of judicial, the hearing procedures bear no resemblance to a criminal trial, nor even to a civil action. The deportation hearing is conducted by a "special inquiry officer" or immigration judge, who is a member of the executive branch. 8 U.S.C. § 1252(b) (1980). There is no right to jury trial since the sixth amendment does not apply. The immigration judge is authorized by the Act to perform the multiple roles of prosecutor and adjudicator. 8 U.S.C. § 1252(b) (1980). This commingling of functions is an anomaly in administrative law, permitted to continue by Congress when it exempted the Immigration Act from the strictures of the Administrative Procedure Act, which the Court has held does not violate due process. *Marcello v. Bonds*, 349 U.S. 302, 309-10 (1955). In a criminal trial, on the other hand, the judge is required to be neutral and may not assume the role of prosecutor. *See, e.g., Petway v. United States*, 391 A.2d 798, 799 (D.C. App. 1978).

Further, although the regulations permit an immigration judge to withdraw if he or she deems himself or herself disqualified, 8 CFR § 242.8(b) (1986), the regulations do not prescribe any procedure for challenging the judge's qualifications or alleged bias before the deportation hearing. C. Gordon & E. Gordon, *Immigration Law*

and Procedure 5.7a (1986). This contrasts with the elaborate procedures for ensuring an impartial jury in criminal trials. *See, e.g., Akins v. Texas,* 325 U.S. 398, 403 (1945) (finding discriminatory jury selection process invalid); *Glasser v. United States,* 315 U.S. 60, 85-86 (1941) (selection of jury panel must be unbiased and indiscriminate).

Perhaps the most significant distinction from the point of view of the alien between deportation and criminal proceedings is the absence of a meaningful right to counsel in deportation proceedings. Indigent persons facing deportation have no right to counsel at government expense, unlike criminal defendants. *Compare Chlomos v. INS,* 516 F.2d 310, 314 (3d Cir. 1975); 8 U.S.C. § 1252(b) (1980) (alien must procure counsel at own expense); *with Gideon v. Wainwright,* 372 U.S. 335 (1963) (sixth amendment requires appointment of counsel at government expense for indigent criminal defendant). According to the Act, the assistance of counsel is not a right, but a "privilege". 8 U.S.C. § 1252(b) (1980). Thus, even where this "privilege" to be represented by counsel has been impaired, it has been held to be merely a "procedural omission" which does not violate the due process clause unless it can be shown to have been prejudicial. *Matter of Santos,* Interim Decision No. 2969 (BIA 1984). Even when counsel is retained, the alien does not have the right to "effective assistance" of counsel under the sixth amendment nor necessarily grounded in the fifth amendment guarantee of due process. *Mantell v. United States Department of Justice,* INS, 798 F.2d 124, 127 (5th Cir. 1986).

The applicable burden of proof also differentiates deportation from a criminal trial. The burden of proof in a deportation hearing is on the government to show alien-

age and deportability by "clear, unequivocal, and convincing evidence." *Woodby v. INS*, 385 U.S. 276, 286 (1966). This burden is considerably lighter than the "beyond a reasonable doubt" standard which the prosecution must meet in criminal cases. *See In re Winship*, 397 U.S. 358, 364 (1970) (due process clause requires proof beyond a reasonable doubt of "every fact necessary to constitute the crime charged"). Of even greater practical significance than the actual standard of proof for deportation is the shifting of the burden of proof to the alien in two important instances. First, if the lawfulness of the alien's entry is in question, once the Government establishes alienage (usually through an admission by the alien that he or she was born outside the United States), the alien has the burden of proof as to the time, place, and manner of entry, which raises a presumption of deportability if not met. 8 U.S.C. § 1361 (1980). Second, if the alien becomes institutionalized or a public charge within five years of entry, he or she bears the burden of showing that the underlying cause or condition did not exist at the time of entry. 8 U.S.C. § 1251(a)(3), (8) (1980).

The strict requirements of the fourth and fifth amendments in criminal trials likewise do not apply in deportation proceedings. In *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), the Court found that evidence seized in violation of the fourth amendment was admissible in a deportation hearing. The reach of the fifth amendment protection against self-incrimination is similarly circumscribed. Since the proceeding is not criminal the alien can be compelled to testify. *Bilokumsky*, 263 U.S. at 155. The alien enjoys no presumption of innocence, and therefore the immigration judge may draw an adverse inference

from the alien's silence, both as to incriminating and non-incriminating facts. *See Vajtaur v. Comm'r of Immigration,* 273 U.S. 103, 112 (1927); *Bilokumsky,* 263 U.S. at 154; *United States v. Alderete-Deras,* 743 F.2d 645, 647 (9th Cir. 1984).

There are no formal rules of evidence in deportation proceedings. The rules of evidence used by courts generally do not apply in deportation proceedings. *See Tisi v. Tod,* 264 U.S. 131, 133-34 (1924); *Shu Fuk Cheng v. INS,* 476 F.2d 1180, 1182 (8th Cir. 1973). According to the Act, the evidence adduced need only be "reasonable, substantial, and probative" to prove deportability. 8 U.S.C. § 1252(b) (1980). This definition permits the use of evidence that courts generally would find incompetent. Of particular note is the admissibility of hearsay to establish deportability. *See Martin-Mendoza v. INS,* 499 F.2d 918 (9th Cir. 1974); 8 C.F.R. § 242.14(c) (1986) (prior statements of alien and oral and written statements of any person made during an investigation are admissible).

The ability of the alien to defend against charges of deportability is further limited by the almost complete absence of formal discovery in deportation proceedings. Discovery is not provided for in the regulations. Attempts by the alien to gain discovery have been unsuccessful. *See, e.g., Marroquin-Manriquez v. INS,* 699 F.2d 129 (3d Cir.) *cert. denied* 456 U.S. 994 (1983) (upholding denial of request for letters rogatory and subpoena duces tecum); *Matter of Benitez,* Interim Decision No. 2979 (BIA 1984) (holding that the Federal Rules of Civil Procedures do not apply, and that there is no requirement that a request for discovery be honored); *Matter of Magana,* 17 I. & N. Dec.

111 (BIA 1979) (holding that the government is not required to respond to interrogatories). Limiting discovery to an examination of the government's evidence at the time of the hearing has been held to satisfy the requirement of due process. *Da Silva Pereira v. Murf*, 169 F. Supp. 81 (S.D.N.Y. 1958).

The form that most deportation hearings take would never be permitted in a criminal trial. For example, mass hearings in which multiple unrepresented aliens appear and are forced to plead simultaneously or in unison, as was done in the present case, have been held not violative of due process. *United States v. Nicholas-Armenta*, 763 F.2d 1089 (9th Cir. 1985). Nor is the immigration court required to provide simultantous translation to aliens who do not speak English. *See Matter of Exilus*, 18 I. & N. Dec. 276 (BIA 1982). Moreover, aliens have no right to have their deportation hearings held in any certain venue, unlike criminal proceedings. The courts have held that INS transfers of aliens for the purpose of instituting deportation proceedings to locations far distant from their homes and families, as the government also did in the present case, is within the discretion of the INS. *See Committee of Central American Refugees, et al. v. INS, et al.*, 795 F.2d 1434 (9th Cir. 1986); *Rios-Berrios v. INS*, 776 F.2d 859, 863 (1985); *Cf. Ledesma-Valdes v. Sava*, 604 F.Supp. 675 (S.D.N.Y. 1985) (transfers for exclusion hearings did not deprive aliens of right to representation). Even more surprisingly, the Act gives the immigration court the authority to enter an order of deportation in absentia. 8 U.S.C. § 1252(b) (1980). *See Patel v. INS*, 803 F.2d 804 (5th Cir. 1986); *Shah v. INS*, 788 F.2d 970 (4th Cir. 1986).

3. Lack of Post-Hearing Appellate Protections

The time granted to the alien to exercise his or her right to appeal an adverse decision by the immigration judge is extremely brief. If the alien does not waive his or her right to appeal at the deportation hearing, the regulations provide that the alien must file a notice of appeal within ten days of the oral decision of the immigration judge or, if the decision is served by mail, within thirteen days from the date it is mailed. 8 C.F.R. §242.21 (1986). Should the alien miss this brief opportunity to appeal, the deportation order becomes final and he or she is subject to immediate deportation. 8 C.F.R. §§ 243.1, 243.2 (1986). Until recently, the regulations required INS to give aliens who were not already in custody notice at least 72 hours before their deportation to provide them with an opportunity to close out their affairs. *See* 8 C.F.R. § 243.3 (1985). Since the INS has repealed the notice regulation, 51 Fed. Reg. 23041-23042 (June 25, 1986), an alien who affirmatively waives his or her right to appeal or fails to file a notice of appeal during the ten day period may be deported at once, without notice.

As the above examples demonstrate, the level of due process afforded aliens in deportation proceedings is minimal. The alien is not entitled to a jury trial, appointed counsel, or the full scope of fourth, fifth and sixth amendment rights. The government's burden of proving deportability is significantly lower than that needed to establish a criminal conviction and the lack of procedural safeguards as compared to a criminal trial handicaps the alien's ability to defend against a charge of deportability. These fundamental distinctions between the procedural protections of deportation proceedings and criminal trials

urge that due process would be violated if a deportation could be used to conclusively establish a material element of a criminal offense.

B. Even the Minimal Standard of Due Process Required in Deportation Hearings is Frequently Violated.

Although aliens in deportation proceedings are afforded some due process protections, the tremendous and growing workload facing the immigration courts, the lack of available counsel, and the alien's inability to understand the procedures and thus to effectively exercise his or her rights lead to frequent violations of the alien's right to due process of law. The courts should permit a collateral review of a deportation order which the government seeks to use as the basis for a criminal conviction because aliens are often denied even the minimal standard of due process required in their deportation proceedings and because these violations often result in the alien's inability to exercise his or her right to seek review of the deportation decision.

The workload of the immigration courts is enormous and continues to grow. For example, in fiscal year 1982, 68,000 cases were filed in the federal immigration courts. In 1985, the number of cases almost doubled to 134,000. Girdner, *Inside the Immigration Court,* 6 Cal. Law., June 1986, at 64. INS and the immigration courts face a serious shortage of personnel to manage this burgeoning caseload. In the Los Angeles district, for example, at least 21,000 cases are currently pending but only nine government trial attorneys and seven immigration judges are available to handle them. *Id.* This workload and the lack of resources

has led the INS to emphasize the speedy processing of suspected deportable aliens, at the expense of a full adjudication in a deportation hearing where the alien is protected by at least some procedural safeguards.

The majority of apprehended aliens never get the opportunity to exercise their procedural rights in a deportation hearing because they accept the option of departing voluntarily, as provided by § 244(e) of the Act, 8 U.S.C. § 1254(e) (1980), thereby waiving their rights to counsel and to a hearing. In 1979, for example, 966,137 aliens chose voluntary departure, while only 25,888 were deported after a formal hearing. Developments in the Law, *Immigration Policy and the Rights of Aliens,* 96 Harv. L. Rev. 1286, 1390 (1983) [hereinafter *Rights of Aliens*]. A request for voluntary departure may be made and granted informally, either in the field or at an immigration processing or detention center by the Officer in Charge or Chief Patrol Agent. *See* Gordon & Rosenfield, 2 *Immigration Law and Procedure,* § 7.2d(1) (Rev. ed. 1986).

The methods used by INS officers to obtain the alien's acceptance of voluntary departure often violates the alien's right to due process of law. The usual practices of the INS used to persuade apprehended Salvadoran nationals to request voluntary departure have been preliminarily enjoined as violative of due process. *Orantes-Hernandez v. Smith,* 541 F.Supp. 351 (C.D. Cal. 1982). In *Orantes-Hernandez,* the court found a nationwide pattern of INS abuse in coercing Salvadorans to accept an unknowing waiver of their rights to a deportation hearing, to the assistance of counsel, and to apply for political asylum. *Id.*

These findings in the *Orantes-Hernandez* case are corroborated by a study conducted in 1983 of fifty-one aliens, forty-eight of whom chose voluntary departure. The study found that immigration officials did not explain to thirty of the aliens who chose voluntary departure the consequences of waiving their right to counsel and a hearing, or the available alternatives. Officials told eighteen about the right to appeal a deportation order to an immigration judge, but they actively discouraged the aliens from pursuing this. *See* Note, *Justice and the Undocumented Immigrant: Authority and Practices of the Immigration and Naturalization Service*, 19 Stan. J. Int'l L. 407, 424-25 (1983).

The atmosphere of fear and intimidation created by the INS has also been documented by the United States Commission on Civil Rights. *See* California Advisory Comm., U.S. Comm'n on Civil Rights, *A Study of Federal Immigration Policies and Practices in Southern California* (1980) [hereinafter *Immigration Policies Study*]. Witnesses testify in their study that aliens "are not apprised of their rights," *id.* at 35 (statement of Mark Rosenbaum of the American Civil Liberties Union in Los Angeles); "if a person insists on bail, insists on a hearing, insists on an attorney, he will be segregated and ridiculed," *id.* (statement of Robert Miller, a Los Angeles immigration attorney); and that "[w]hen a person is first detained, and is not processed yet . . . that person has no access to an attorney, even if an attorney wants to be there at the questioning of the detainee." *Id.* at 36 (statement of Ellen Lee, acting director, One-Stop Immigration Center).

Those aliens who despite INS discouragement and intimidation insist on their right to a deportation hearing often find that the hearing does not meet the promise of

due process of law. The foremost problem is that most aliens are unrepresented at deportation hearings. Although aliens have a statutory right to be represented by counsel at deportation hearings, in practice, attorneys are not available. Aliens in INS detention receive a list of free or low-priced agencies, but the services of these agencies are in high demand. Many do not accept collect calls or represent people in detention. Girdner, *supra*, at 64. And the lack of counsel, in many cases, deprives the alien of relief to which he is entitled. William R. Robie, Chief Immigration Judge of the United States, agrees that the shortage of legal counsel is a serious problem for the immigrants. *Id.; see also Immigration Policies Study, supra*, at 37 (noting that INS attorneys complain of the lack of counsel at deportation hearings). There is no doubt that representation has a dramatic effect on the outcome of deportation proceedings. *See Immigration Policies Study, supra* at 37-38 (reporting that in at least 70 percent of the cases in which counsel had appeared, the alien was still in the U.S. in some kind of legal status one year later); *see also id.* at 38 (statement of Immigration Judge Jay Segal that the assistance of counsel is extremely important in deportation hearings, especially when an alien is eligible for some relatively complex type of relief).

The increasing caseload has intensified the pressure on INS and the immigration courts to accelerate the processing of deportations. The "short-cuts" through the alien's due process rights to which INS may resort in such a situation is amply documented in *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982), *aff'ming Haitian Refugee Center v. Civiletti*, 503 F.Supp. 442 (S.D. Fla. 1980). The court there found that the INS' "Haitian

Program", designed to expedite the sizeable backlog of Haitian deportation cases, had violated the alien's rights to due process by scheduling mass hearings, interfering with their right to assistance of counsel by knowingly scheduling conflicting hearings, setting unattainable filing deadlines for political asylum applications, and failing to afford an opportunity for full presentation of individual cases. *Haitian Refugee Center*, 676 F.2d at 1040.

It might be hoped that the conditions created by INS in the Haitian Program were an extreme case, but the facts of the present case indicate that the actual procedural safeguards for unrepresented aliens in the more typical situation is only slightly better. Respondents Mendoza-Lopez and Landeros-Quinones were arrested in Nebraska, where they lived and worked. They were tranferred to Omaha, where they were initially processed, and then flown 500 miles to Denver, Colorado, where they were detained pending a deportation hearing. Memorandum Opinion of District Court attached at Appendix B to Petition for Certiorari (hereinafter "App.") at 8a-9a. Respondents' hearings were combined with those of eleven other suspected illegal aliens. None of the thirteen were represented by counsel. In fact, at least five of the thirteen aliens did not receive the list of free legal services until they appeared for their hearing. (App. 19a). At times all thirteen were questioned in unison, including the question whether they wished to have a continuance to attempt to find counsel to represent them (App. 19a-20a). Although both respondents expressed an interest in applying for suspension of deportation pursuant to § 244(a) of the Act, 8 U.S.C. § 1254(a) (1980), for which they appeared to be prima facie eligible, the immigration judge deported

them rather than providing them with an opportunity to apply (App. 21a-22a). They waived their right to appeal at the hearing (App. 23a), and were physically deported only eight days after they were apprehended (App. 9a).

The court below correctly held that the type of due process violation which occurred in the deportation proceeding in the case at bar could be reviewed in a later criminal prosecution for reentry after deportation. The court reasoned that because the respondents were eligible for suspension of deportation, the immigration judge's failure to adequately inform the respondents about this relief "materially affected" the result of the hearing. *United States v. Mendoza-Lopez*, 781 F.2d 111, 113 (8th Cir. 1985). The Eighth Circuit has thus adopted the rule that the alien must show prejudice to prevail on a claim that due process was violated at the underlying deportation hearing. *See United States v. Nicholas-Armenta*, 763 F.2d 1089 (9th Cir. 1985). Such a rule is necessary to permit the criminally accused to demonstrate that the deportation order was unlawful.

C. Collateral Review of a Deportation Order Underlying a Criminal Prosecution for Reentry Should be Permitted Because the Direct Review Procedures May be Inadequate Where Due Process Was Violated.

The petitioner argues that permitting collateral review of the validity of a prior deportation in a criminal conviction for reentry after deportation is in some sense an "end run" around the system for review of deportation proceedings provided in the Act. Permitting the criminal defendant to attack the lawfulness of the underlying deportation order as an element of the crime does not en-

courage aliens to ignore the opportunity for administrative review but rather it may provide the only meaningful chance for review in many cases where due process has been violated.

The Act provides two remedies for unlawful deportation orders which, according to the Petitioner, should be deemed to be exclusive. The first, of course, is direct appellate review of the deportation order pursuant to section 106 of the Act. 8 U.S.C. § 1105a (1980). The second is a request for permission to reapply for admission after deportation found in 8 C.F.R. § 212.2 (1986). These remedies are illusory, however, for many aliens.

Section 106(a)(1) provides for judicial review of deportation orders in the circuit courts where the alien files a petition for review within six months of the final order. 8 U.S.C. § 1105a(a)(1) (1980). That right to review is lost, however, if the alien has not exhausted his or her administrative remedies or has left the country. § 106(c); 8 U.S.C. § 1105a(c). As discussed above, the alien has only ten or thirteen days in which to exercise his right to administrative review, after which the order becomes final and the alien is deportable. 8 C.F.R. § 242.21 (1986). Once the alien is deported, the opportunity for review is lost. Although, in some circuits, a deportation executed in violation of regulations will still be reviewable despite the alien having left the country, *see Zepeda-Melendez v. INS*, 741 F.2d 285 (9th Cir. 1984); *Juarez v. INS*, 732 F.2d 58, 59-60 (6th Cir. 1984), in actuality, few aliens deported in violation of regulations will be aware of this remedy or practically be able to effectuate it from a foreign country.

The right to seek direct administrative review is illusory when the due process violation results in an unknowing waiver of the right to appeal. In the present case, for example, the district court found it "inconceivable that they would so lightly waive their right to appeal, and thus to the relief they now claim entitlement, if they had been fully apprised of the ramifications of such a choice." (App. 23a). Or, to take a more extreme example, of what use is the right to seek administrative review if, after an alien exercised his or her right to appeal an adverse decision, he or she were to be physically deported in violation of law? By insisting on a strict interpretation of the review statute, the government would apparently not permit the criminal court trying a person charged with reentry after such an illegal deportation to raise this as a defense.

Requesting the Attorney General for permission to reapply for admission, the other remedy suggested by the government for persons unlawfully deported, is equally as illusory for many aliens. Permission to reapply is a discretionary remedy which acts as a waiver of the grounds of excludability found in §§ 212(a)(16) (alien who has been excluded from the country during the past year), and 212(a)(17) of the Act (alien who has been previously deported). 8 U.S.C. §§ 1182(a)(16), (17) (1980). Permission to reapply is sought only when the alien would otherwise qualify for admission (i.e., when a visa is available). *See Matter of Tin,* 14 I. & N. Dec. 371, 373 (Reg. Comm'r 1973). The factors to be weighed in deciding on a request for permission to reapply are traditional equity and hardship factors, such as presence of family in the United States. *Id.*

A request for permission to reapply for admission would not have offered any relief in the present case because neither respondent would have qualified for admission to the U.S. There is no evidence that they qualified for a visa. Instead, the type of relief for which they appeared eligible at their hearing, suspension of deportation, may only be requested by an alien who has not departed the United States within the preceding seven years. *See INS v. Phinpathya*, 104 S.Ct. 584 (1984). Because the respondents' deportation destroyed their only grounds for relief, permission to reapply for admission would not have been possible.*

D. It is a Violation of Due Process to Use a Deportation Order to Conclusively Establish a Material Element of a Criminal Offense.

The requirement that the procedures satisfy some standard of due process of law applies to both deportation proceedings and to criminal trials. *See, e.g., The Japanese Immigrant Case*, 189 U.S. 86 (1903) (applying fifth amendment to deportation); *Rochin v. California*, 342 U.S. 165 (1952) (applying fourteenth amendment due process clause to state criminal trial). As this brief has described, however, the answer to "the question . . . what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), differs enormously between the two proceedings.

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* The recently-enacted Immigration Reform and Control Act of 1986 does not change this result. Even though 244(b)(3) has been added to the Immigration and Nationality Act in partial response to *Phinpathya*, it simply provides that an absence which is "brief, casual and innocent" will not meaningfully interrupt the continuous physical presence. The rule that a departure under an order of deportation or voluntary departure interrupts continuous physical presence has not been affected. *See Barragan-Sanchez v. Rosenberg*, 471 F.2d 758 (9th Cir. 1972)

The rationale for a higher level of procedural safeguards in criminal proceedings stems not only from the rights granted specifically to criminal defendants by the Constitution, such as the right to trial by jury or the sixth amendment right to assistance of counsel, but also from the higher level of procedures required in criminal proceedings by the Court's due process analysis. This Court has judged the constitutional adequacy of the procedures by balancing the competing private and governmental interests at stake in the proceeding. *Matthews v. Eldridge*, 424 U.S. 319, 334-35 (1976). The factors to be weighed include: the strength of the private interest affected by the governmental action; the likelihood of governmental error through the procedures used; the probable value of additional procedural safeguards; and the governmental interest at stake. *Id.* at 335. This Court has recognized that due process is flexible and ". . . that not all situations calling for procedural safeguards call for the same kind of procedure." *Morrissey*, 408 U.S. at 481.

The Court has ruled that the interest of the alien facing deportation is not equivalent to that of the criminally accused. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984). The Court's rationale for the relaxed procedural safeguards of the deportation proceeding has been that deportation is not punitive and that the constitutional protections for penal proceedings therefore do not apply. *Id.* To grant deportation orders preclusive effect in establishing criminal liability would appear to undermine the Court's expressed justification for the lower standard of due process.

The Court has recognized the conflict between the strict procedural safeguards guaranteed in a criminal trial

and the informal administrative process. In *Estep v. United States,* 327 U.S. 114 (1946), this Court held that in a criminal prosecution under Section 11 of the Selective Service Act the defendant must be permitted to raise as a defense the unlawfulness of the local induction board's action. *Id.* at 122-23. The Court noted that "[w]e are loath to believe that Congress reduced criminal trials under the Act to proceedings so barren of the customary safeguards which the law has designed for the protection of the accused." *Id.* at 122.

The government contends that *Estep* is inapposite because in that case Congress had made no provision for judicial review of the underlying administrative order. Brief for Petitioner, United States of America, at 21 n.16. As pointed out above, however, the right to appeal a deportation order is in many situations meaningless. Moreover, the availability of judicial review does not alter the underlying rationale that criminal defendants should be afforded a higher level of due process protection that mere reliance on an administrative order.

The absence of the safeguards of a criminal trial in the underlying element to be proved distinguishes this case from the decision in *Lewis v. United States,* 445 U.S. 55 (1980), in which a defendant in a prosecution for unlawful possession of firearms by a felon was barred from attacking the underlying felony conviction. 445 U.S. at 65. Lewis was convicted after a jury trial with the full spectrum of constitutional safeguards in force. In contrast, the alien is ordered deported after an administrative hearing accompanied by only minimal due process protections. Further, the convicted felon has a much more meaningful right

to appeal his or her conviction than does the deported alien. The criminal defendant has a first appeal as of right, and the indigent defendant is entitled to appointed counsel. *See Douglas v. California,* 372 U.S. 353 (1963). *Lewis* does not reach the issue in this case: whether the fundamental fairness required by the due process clause is violated when a court relies on an invalid administrative order to prove an element of a crime.

As the government contends, the Court came perilously close to endorsing that reasoning in *Yakus v. United States,* 321 U.S. 414 (1944), upholding the Emergency Price Control Act against a constitutional challenge. The Act provided that a person subject to a maximum price regulation could not attack its validity in a criminal prosecution for violating the regulation. 321 U.S. at 429-30. The Court justified this unprecedented incursion on the rights of the criminally accused by relying heavily upon exigencies of war-time inflation and the harm that would result from delayed or unequal price control. Even under these circumstances, this decision was roundly criticized. *See, e.g.,* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts,* 66 Harv. L. Rev. 1362, 1402 (1953); Note, *Judicial Review and the Price Control Act,* 24 Bos. U. L. Rev. 250 (1944). No such war-time exigencies justify the infringement of the rights of a person charged with reentry after deportation here urged by petitioner.

The defendant in a Section 1326 proceeding must, therefore, be allowed to collaterally attack the underlying deportation when it was entered in violation of law. Neither *Lewis* nor *Yakus* control the decision here because the first involved a prior judicial determination and the latter

the exigencies of wartime price control. As recognized by the Court in *Estep* and by the dissenters in *Spector*, permitting an element of a crime to be conclusively established in an administrative proceeding violates the criminal defendant's right to due process of law.

III.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,

Petitioner,

—v.—

JOSE MENDOZA-LOPEZ AND ANGEL LANDEROS-QUINONES,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION AND THE NATIONAL LAWYERS GUILD

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INTEREST OF AMICI[1]

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization of over 250,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution and laws of the United States. The ACLU has long been actively involved in issues concerning immigration law and the rights of aliens. In particular, the Immigration and Aliens' Rights Task Force of the ACLU is concerned with the application of due process and equal protection safeguards to aliens and immigrants.

The National Immigration Project of the National Lawyers Guild is

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[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court under Rule 36.2 of the Rules of this Court.

a national organization engaged in immigration and nationality law projects of public and social concern which promote the fair and humane administration of justice relating to immigration, nationality and refugee law, insure the fair and equal application and adjudication of the policies and programs related thereto, and facilitate the meaningful exercise of civil and constitutional rights regardless of race, religion, nationality or economic position.

SUMMARY OF ARGUMENT

The text of 8 U.S.C. § 1326 is ambiguous on its face. Accordingly, Section 1326 must be construed with reference to its legislative history, which reveals that Congress intended to allow individuals in Section 1326 criminal proceedings to collaterally attack an underlying deportation order. The sev-

eral statutory provisions sanctioning reentry in effect prior to the enactment of Section 1326 were held to allow such challenges to an underlying deportation order, and Congress incorporated the language of one of these prior provisions into Section 1326. When Congress adopts the language of a prior law without comment, Congress is presumed to know and to adopt the interpretations given that law.

Nothing in the legislative history of 8 U.S.C. § 1105a suggests that Section 1105a might preclude collateral attack in proceedings arising from reentry under Section 1326. Through Section 1105a, Congress intended to expedite deportation proceedings. Reentry was outside the scope of the statute. Moreover, since collateral attack on deportation orders is allowed in criminal proceedings under 8 U.S.C. § 1252(d) and (e)

and in civil proceedings under 8 U.S.C. § 1253, barring such a challenge under Section 1326 would be anomalous.

As the legislative history shows, a criminal conviction under Section 1326 must rest upon a previous lawful deportation. Without this predicate, the subsequent criminal prosecution would violate due process by imposing criminal sanctions as the result of an initial proceeding conducted without the proper constitutional safeguards. Where the determination of the initial proceeding is unreliable -- because it was reached without the safeguards required in a criminal trial or because an alien had no meaningful opportunity to challenge its validity -- it cannot be used in a subsequent criminal proceeding as a substitute for proving a material element of the crime charged.

Only in a few instances has this Court barred a challenge to the validity of the predicate finding in a criminal proceeding: either where the constitutional problem has been cured by permitting the litigant an adequate opportunity to appeal the decision or where Congress has unambiguously indicated that the subsequent conviction depends only on the fact, not the reliability, of the predicate determination. Where, as here, there is neither an adequate opportunity to appeal nor an unambiguous indication by Congress, the Constitution requires that an alien in a criminal prosecution be permitted to challenge the validity of the underlying deportation order.

ARGUMENT

POINT I

CONGRESS DID NOT INTEND TO PROHIBIT COLLATERAL ATTACK ON DEPORTATION ORDERS IN SECTION 1326 CRIMINAL PROSECUTIONS

Section 1326 of Title 8, United States Code, is a criminal statute which makes unauthorized reentry into the United States by an alien who has been deported within the preceding five years a felony. The language of Section 1326 is ambiguous on its face. The statute does not state whether the "deportation" element of the crime of reentry is satisfied by any deportation, however unlawful, or whether the statute applies only to aliens who reenter without permission after a lawful deportation. Because of the law's facial ambiguity, this Court's inquiry must go beyond the words of the

statute. Blum v. Stenson, 465 U.S. 886, 896 (1984).

The legal principles that guide the Court's inquiry are familiar. As a criminal statute, Section 1326 must be narrowly construed. Dowling v. United States, 105 S. Ct. 3127, 3131-32 (1985); United States v. Campos-Serrano, 404 U.S. 293, 297 (1971); United States v. Laub, 385 U.S. 475, 480 (1967). See generally W. La Fave & A. Scott, Handbook on Criminal Law 72-73 (1972). Similarly, as a law concerning deportation, the statute's interpretation must be limited to "the narrowest of several possible meanings of the words used." Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948). See INS v. Errico, 385 U.S. 214, 225 (1966); Bonetti v. Rogers, 356 U.S. 691, 699-700 (1958); Barber v. Gonzales, 347 U.S. 637, 640-641 (1954). Section 1326 cannot, moreover,

be construed in a vacuum, but must be read in light of the legislative history which explains its origins and the statutory scheme of which it is a part. United States v. Morton, 467 U.S. 822, 828 (1984); Watt v. Alaska, 451 U.S. 259, 266-267 (1981).

A careful review of these sources -- and the relevant case law interpreting Section 1326's predecessor statutes -- confirms that Congress did not intend to preclude a defendant in a Section 1326 prosecution from challenging the validity of the predicate deportation order.

A. The Earlier Statutory Provisions From Which Section 1326 Evolved Permitted Collateral Attack

Unauthorized reentry following deportation was first made a felony by the Immigration Act of 1929, 8 U.S.C. § 180 (repealed 1952), that extended the

crime to "any alien . . . arrested and deported in pursuance of law."[2] In addition, Section 180 provided the civil penalty of deportation for any alien previously deported. Section 180 was not, however, the only statutory provision in effect prior to Section 1326 which addressed unauthorized reentry of a previously deported alien. Section 155 of Title 8, United States Code, enacted in 1917, provided that

> any alien who, after being excluded and deported or arrested and deported [in connection with prostitution] shall return to and enter the United States [within five years] . . . shall, upon the warrant of the Secretary of Labor, be taken into custody and deported.

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[2] The impetus for the 1929 legislation was Congress' desire to deter reentry of deported aliens. S. Rep. No. 1456, 70th Cong., 2d Sess. (1929); H.R. Rep. No. 484, 70th Cong., 1st Sess. 19-20 (1928).

8 U.S.C. § 155 (repealed 1952; emphasis added). Similarly, 8 U.S.C. § 137 (repealed 1952), enacted in 1918, extended felony sanctions to reentering aliens initially deported as radicals.[3] Finally, Section 138 of the Immigration Act of 1917 provided the penalty of a misdemeanor conviction for any reentering alien previously deported "in pursuance of the provisions of this Act" as a prostitute, procurer or other immoral person. 8 U.S.C. § 138 (repealed 1952).

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[3] Section 137 provided in relevant part that "any alien who shall, after he has been excluded and deported or arrested and deported in pursuance of the provisions of this Act, thereafter return to or enter the United States or attempt to return to or enter the United States shall be deemed guilty of a felony." 8 U.S.C. § 137. There are no reported cases arising under the reentry provision of 8 U.S.C. § 137.

Thus, from at least 1917 to 1952, there were several provisions of immigration law providing for the criminal prosecution or civil deportation of aliens who, after being deported, reentered the United States without authorization. Each provision contained slightly different language to describe the predicate deportation order giving rise to the criminal or civil penalties. Compare Section 180 ("deported in pursuance of law") with Section 155 ("excluded and deported or arrested and deported") and Sections 137 and 138 (deported "in pursuance of the provisions of this Act").

In 1952, Congress repealed these provisions and enacted a single felony reentry statute, Section 1326. In doing so, Congress did not carefully delete "in pursuance of law" from Section

180 to create the current Section 1326. Rather, Congress chose language nearly identical to that of Section 155 without indicating any intent to change or modify then-existing practice, which had permitted collateral attack under Sections 180, 155 and 138, despite their different verbal formulations (and despite the absence of "in pursuance of law" from Section 155).

The case law allowing collateral attack under the predecessor statutes to Section 1326 is considerable. In one of the few reported criminal reentry cases prior to the enactment of Section 1326, an alien prosecuted under Section 138 was allowed to challenge the validity of her underlying warrant of deportation. Mills v. United States, 273 F. 625, 626 (9th Cir. 1921). Similarly, in deportation proceedings pursuant to Sections 180

and 155, arising from unauthorized reentry, both courts and administrative agencies permitted collateral attack of a previous deportation order when there was "a gross miscarriage of justice in the former proceedings." United States ex rel. Rubio v. Jordan, 190 F.2d 573, 576 (7th Cir. 1951). See United States ex rel. Beck v. Neely, 202 F.2d 221, 223 (7th Cir.), cert. denied, 345 U.S. 997 (1953) (allowing collateral attack on deportation under Section 155); United States ex rel. Steffner v. Carmichael, 183 F.2d 19, 20 (5th Cir.), cert. denied sub nom. Steffner v. Savoretti, 340 U.S. 829 (1950) (deportation for reentry upheld under Section 155 after examination of prior deportation proceedings); United States ex rel. Bartsch v. Watkins, 175 F.2d 245, 247 (2d Cir. 1949) (collateral attack under Section 180 denied after

preliminary inquiry on merits)[4]; In re P, 3 I. & N. Dec. 818, 819 (BIA 1949) (reviewing underlying deportation proceeding to determine if prior proceeding was "in pursuance of law").[5]

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[4] To the extent that the decision in United States ex rel. Koehler v. Corsi, 60 F.2d 123 (2d Cir. 1932) suggests that collateral attack was not available in deportation proceedings under Section 180, its conclusions and reasoning have been superseded by subsequent decisions. The case was decided in 1932, only three years after the enactment of Section 180. The court purported to reject collateral attack solely on the basis of its own reasoning -- set out in four sentences -- without reference to analogous provisions or legislative history. Though Koehler has been subsequently cited for the dicta therein, its holding has been ignored in more recent decisions. See, e.g., United States ex rel. Bartsch v. Watkins, 175 F.2d 245, 247 (2d Cir. 1949).

[5] The explicit concern for due process enunciated by courts considering initial deportations and anticipating the effect of Section 180 on the deported alien further indicates substantial judicial sentiment that

(Footnote continued)

The rationale for restricting collateral attack at all was the desire to limit dilatory tactics in deportation proceedings, since "if in each subsequent case the validity of the previous deportation orders had to be determined, 'there would be no end to the proceedings

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(Footnote 5 continued from previous page) collateral attack should be available in a criminal proceeding under Section 180. See Browne v. Zurbrick, 45 F.2d 931, 932 (6th Cir. 1930) (by Section 180 "deportation becomes as to aliens who have established a domicile here a decree of perpetual banishment and exile -- regardless of fixed family and business ties and connections; and it more clearly carries a heavy burden of 'possible human woe.'"); United States ex rel. Barchi v. Day, 38 F.2d 815, 816 (S.D.N.Y. 1930) (asking immigration authorities at time of first deportation "to ameliorate the strict rule of [Section 180]," in later proceedings, since alien was deported "either through ignorance of our often changed immigration laws, or in pursuance of poor advice").

cast upon administrative agencies.'" Rubio, 190 F.2d at 576 (quoting Steffner, 183 F.2d at 20). This objection -- the problem of indefinitely delayed deportation -- is irrelevant in the criminal context, where the proceeding results in a felony conviction rather than a deportation. Further, the deterrent purpose of the felony provision would not be affected by allowing collateral challenges in some cases, since the reentering alien would still face the prospect of criminal prosecution and incarceration upon reentry. See Note, Collateral Attacks on Deportation Orders in Prosecutions for Illegal Reentry, 48 U. Chi. L. Rev. 83, 98-99 (1981) (citing McKart v. United States, 395 U.S. 185, 199-200

(1969)).[6] At least the same degree of collateral inquiry must be permitted in a criminal prosecution where the stakes and the commensurate due process protections are far greater.

Thus, Section 1326 was drafted in 1952 against a background that permitted an alien in proceedings under Sections 180, 155, and 138 to challenge the validity of the underlying deportation order in a subsequent proceeding predicated on an earlier deportation. Absent evidence to the contrary, these

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[6] An additional concern about the impact of allowing collateral attack in deportation proceedings raised in Steffner was the age of the underlying deportation proceeding at issue in the subsequent case. The court found, however, that this consideration constituted a factor weighing on the merits of a collateral attack rather than precluding such attack. Steffner, 183 F.2d at 21.

established principles are incorporated into current law.

B. Congress Did Not Intend To Reject Existing Law Allowing Collateral Attack

The legislature, in the enactment of a statute, will not be presumed to intend to overturn long-established legal principles, unless such intention clearly appears by express declarations or by necessary implication. Lorillard v. Pons, 434 U.S. 575, 581 (1978); Muniz v. Hoffman, 422 U.S. 454, 469-70 (1975).

In 1952, Congress repealed Sections 137, 138, 155 and 180 and enacted a comprehensive revision of existing immigration law. The preliminary analysis of the proposed revisions began in 1950, with the Senate Committee on the Judiciary's lengthy report on the state of immigration in this country. S. Rep. No. 1515, 81st Cong., 2d Sess. (1950).

After summarizing the criminal provisions relevant to reentering aliens, id. at 646-47, the Committee commented briefly on the need to correlate Sections 137, 138 and 180: "It was suggested that one [reentry] act would suffice for all persons who have been deported, regardless of the reason therefor, and that the present act of March 4, 1929 [Section 180], should be reenacted to cover any and all deportations." Id. at 655 (emphasis added). The Committee concluded with the recommendation that "with a few exceptions all of the penalties both judicial and administrative, be substantially reenacted." Id. at 656 (emphasis added). The only change recommended in the reentry sections was that "[t]he provisions relating to reentry after deportation should be carried forward in one section and apply to any alien de-

ported for any reason and provide the same penalty." Id.

There is no evidence in the legislative history of the 1952 Act that Congress intended to reject the Committee's considered recommendation that existing law "be substantially reenacted," with only superficial changes to consolidate the reentry provisions. Indeed, the 1950 Report was generally relied upon during the drafting of the final bill. H.R. Rep. No. 1365, 82d Cong., 2d Sess. 27, reprinted in 1952 U.S. Code Cong. & Ad. News 1653, 1678 (parts of 1950 Committee Report incorporated into final report). See Dawson Chemical Co. v. Rohm & Haas Co., 448 U.S. 176, 202 (1980) (noting relevance of congressional materials to understanding of final legislation).

The absence of the phrase "in pursuance of law" in Section 1326 is thus the incidental result of Congress' consolidation of Section 137, 138 and 180, rather than a substantive change. In fact, Section 1326 tracks the language of Section 155, which sanctioned reentry of "any alien . . . after being excluded and deported or arrested and deported as a prostitute," 8 U.S.C. § 155 (emphasis added), and which had been construed to permit a collateral challenge to the underlying deportation order at the time of the subsequent proceedings related to illegal reentry. In consolidating the reentry sections of the prior law at 8 U.S.C. § 1326, Congressional drafters simply used the more succinct language of Section 155 for the new felony provision. The legislative evidence thus compels the conclusion that Congress intended to

preserve the prevailing interpretations of Sections 138, 155 and 180 in the new consolidated Section 1326. See Midlantic Nat'l Bank v. New Jersey Dep't of Environmental Protection, 106 S. Ct. 755, 759-60 (1986) (if Congress intends to change judicial interpretation of statute, it makes that intent specific).

C. The Legislative History Of Section 1105a Does Not Evidence Any Congressional Intent To Bar Collateral Attack In Section 1326 Proceedings

Section 1105a of the Immigration and Nationality Act was enacted to provide for prompt judicial review of deportation and exclusion orders. The provision bears no relation to Section 1326 and the legislative history confirms that Congress evidenced no intent for any provision of Section 1105a to affect Section 1326 proceedings. Section 1105a was added to Title 8 in 1961, and pro-

vides that the procedures for judicial review prescribed therein "shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation." 8 U.S.C. § 1105a.[7]

Congress' explicit goal in passing Section 1105a was to expedite deportation by preventing successive petitions for review of deportation and exclusion orders. H.R. Rep. No. 1086, 87th Cong., 1st Sess. 22-23, reprinted in

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[7] The phrase "sole and exclusive" limits direct review of deportation orders to appeals provided in Section 1105a and habeas corpus appeal proceedings. See H.R. Rep. No. 1086, 87th Cong., 1st Sess. 21-22, reprinted in 1961 U.S. Code Cong. & Ad. News 2950, 2967-68; Note, Deportation and Exclusion, 71 Yale L.J. 760, 760-66 (1962). "Sole and exclusive" in § 1105a also clarifies that the Administrative Procedure Act was no longer pertinent to immigration proceedings. C. Gordon & H. Rosenfield, Immigration Law & Procedure, § 8.9Ab n.25 (1986).

1961 U.S. Code Cong. & Ad. News 2950, 2967; H.R. Rep. No. 565, 87th Cong., 1st Sess. 1 (1961). See Cheng Fan Kwok v. INS, 392 U.S. 206, 214 (1968); Foti v. INS, 375 U.S. 217, 226 (1963); Note, Deportation and Exclusion, 71 Yale L.J. 760, 760-62 (1962). The legislative history of the 1961 Act evinces no Congressional intent to extend the provisions of Section 1105a beyond the narrow question at hand, i.e., the speedy deportation of deportable aliens.

Given the purpose of Section 1105a to streamline the deportation process, the absence of any reference to Section 1326 in Section 1105a is of no moment. The 1961 Act addresses only those challenges to deportation orders that arise in the context of deportation, or in the context of effectuating the physical removal of an alien from the

country. Since Section 1252 (d) and (e) relate to aliens who willfully fail to depart from the United States after having been ordered deported, or who willfully violate the terms of supervision following the entry of a deportation order, that section is tangentially related to the concerns that prompted Section 1105a. Section 1326, in contrast, is concerned not with expediting deportation, but with deterring reentry.[8]

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[8] Likewise, Section 1105a(c) does not apply to the criminal context raised in this case. Section 1105a(c), which excludes from review the deportation orders of aliens who have departed from the country after issuance of a deportation or exclusion order, resulted from Congress' concern with the judicially-created action for declaratory judgment available to an alien who was outside the United States. H.R. Rep. No. 1086, 87th Cong., 1st Sess. 30-33, reprinted in 1961 U.S. Code Cong. & Ad. News 2950, 2974-77 (1961 Act restoring law to position it occupied until Supreme Court deci-

(Footnote continued)

Accordingly, the explicit preservation of collateral review in Section 1252 proceedings is particularly noteworthy. Subsection 6 of Section 1105a(a) simply confirms that defenses to criminal prosecutions did not constitute an issue that Congress felt was a problem. Instead, Congress made explicit that the importance of allowing collateral attack

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(Footnote 8 continued from previous page) sion in Brownell v. We Shung, 352 U.S. 180 (1956)). As with the other provisions of Section 1105a, subsection (c) is directed toward speedy resolution of deportation proceedings -- it bars an excluded alien's attempt to pursue direct review from outside the United States -- and has no bearing on a criminal prosecution for reentry. See Note, Deportation and Exclusion, 71 Yale L.J. 760, 788 (1962). Indeed, subsection (c) states that in some cases "the validity of the [deportation] order [will be] previously determined in [a] civil or criminal proceeding." 8 U.S.C. § 1105a(c) (emphasis added).

in a Section 1252 prosecution was unrelated to the interest in expeditious deportation. See H.R. Rep. No. 1086, 87th Cong., 1st Sess. 27-28, reprinted in 1961 U.S. Code Cong & Ad. News 2950, 2970-2971 (need for expedition, yet in criminal proceeding, alien may question validity of deportation order). Thus, the provisions of Section 1105a, which arose in a different context and which confirm the importance of allowing collateral attack in criminal prosecutions, do not constitute a basis for imputing to Congress the intent to modify or restrict the defenses in a Section 1326 prosecution.

In addition, in light of the permissibility of collateral attack under Section 1252 (d) and (e), establishing a different standard in Section 1326 prosecutions would be inconsistent with the

structure of the immigration laws and would create an unintended anomaly. There is no reason to treat criminal proceedings under Sectior. 1326 differently from criminal proceedings arising under Section 1252. The explicit provision for collateral attack under Section 1252 indicates the importance Congress attached to providing such a defense where the government chooses to prosecute rather than deport an alien who has reentered the United States.

Moreover, collateral attack of deportation orders is allowed in other contexts as well. For example, a carrier fined under 8 U.S.C. § 1323 for transporting an alien illegally may present evidence tending to impeach the administrative order excluding the alien in question. In re S.S. Ryndam, 10 I. & N. Dec. 240, 248 (BIA 1963). In addition,

under 8 U.S.C. § 1253 a carrier may contest whether the cause for deportation existed at entry. United States v. Holland-America Line, 231 F.2d 373 (2d Cir. 1956) (carrier challenging fine levied under 8 U.S.C. § 1253); United States v. Prince Line, Ltd., 189 F.2d 386 (2d Cir. 1951) (carrier challenging fine levied under 8 U.S.C. § 156 (current version at 8 U.S.C. § 1253)).

Furthermore, under either statute, the deportation proceedings may have been conducted years before the collateral challenge is ripe. For example, an alien may be supervised under 8 U.S.C. § 1252(e) for many years before he or she violates the requirements of supervision. See, e.g., Dymytryshyn v. Esperdy, 285 F. Supp. 507, 509 (S.D.N.Y.), aff'd, 393 U.S. 77 (1968) (aliens under supervision for more than ten years); Berger v.

Heckler, 771 F.2d 1556, 1559 (2d Cir. 1985) (alien under order of supervision for ten years). In addition, in Section 1252 and Section 1326 proceedings, collateral challenges to the validity of the underlying deportation order have the same effect on judicial efficiency.

Thus, it would be inconsistent with analogous provisions of the immigration laws as well as contrary to well-established principles governing the construction of criminal statutes to interpret Section 1326 so as to deny a criminal defendant prosecuted under that section the affirmative defense that is available to such defendant in every other prosecution where a prior deportation order is a material element of the crime. Accordingly, collateral attack of underlying deportation orders should be

permitted in proceedings under 8 U.S.C. § 1326.

POINT II

PRECLUDING AN ALIEN IN A SECTION 1326 PROSECUTION FROM EVER CHALLENGING THE VALIDITY OF THE UNDERLYING DEPORTATION ORDER VIOLATES DUE PROCESS

The legislative history of Section 1326 shows that a criminal conviction under this section must rest upon a previous lawful deportation. Without this predicate, the subsequent criminal prosecution violates the due process clause. This Court has noted, in other cases, the rationale for limiting the conclusive use of a previous determination in a criminal proceeding: the constitutional safeguards required in a criminal prosecution ensure that the result is a reliable indicator of the defendant's guilt. Lewis v. United States, 445 U.S. 55, 67 (1980). But

where a determination of guilt or civil liability lacks such indicia of reliability, the earlier determination cannot be used in a subsequent criminal proceeding as a substitute for proving a material element of the crime charged. The first determination may be untrustworthy because it is reached without the safeguards required in a criminal trial, see, e.g., Baldasar v. Illinois, 446 U.S. 222 (1980); Loper v. Beto, 405 U.S. 473 (1972); United States v. Tucker, 404 U.S. 443 (1972); Burgett v. Texas, 389 U.S. 109 (1967); or because the defendant had no opportunity to challenge its validity. See Yakus v. United States, 321 U.S. 414, 446 (1943). Only in the rare instance where Congress has clearly indicated that the subsequent conviction depends only on the fact, not the reliability, of the predicate determination has this Court

barred collateral attack. Where, as here, there is no such unambiguous indication, the Constitution requires that an alien in a criminal prosecution be permitted to question the validity of the underlying deportation order.

A. This Court Has Expressed Grave Concern About The Constitutionality Of Using An Administrative Finding Of Deportability In A Criminal Proceeding

This Court first discussed whether the Constitution permits an administrative determination of deportability to be used conclusively in a subsequent criminal proceeding in United States v. Spector, 343 U.S. 169 (1952). Justice Douglas, writing for the Court, neither reached nor foreclosed the constitutional question, id. at 172, while Justices Jackson and Frankfurter who did discuss the issue found it im-

proper to make the predicate deportation order the basis of criminal sanctions where "[t]he adjudication that an alien has been guilty of conduct subjecting him to deportation is not made by procedures constitutional for judgment of crime."[9] Id. at 178. The Justices noted the unfairness of subjecting the alien to a deportation proceeding that is "exclusively civil in nature, with no criminal consequences or connotations," id. at 178, and then using that "deportation [order as] conclusive evidence of his unlawful presence . . . [without permit-

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[9] Justice Black in his separate dissent noted that because he had found the statute void for vagueness he did not need to discuss the issue; but he observed, citing his own opinion, that he had not "yet seen a satisfactory reason for rejecting [Justice Jackson's] view." Id. at 174 n.2.

ting any] inquiry into the correctness or validity of the order." Id. at 177.

1. The Result Of Even A Constitutionally Proper Civil Proceeding May Not Be The Basis For Later Criminal Penalties

Justices Jackson and Frankfurter were troubled that a civil proceeding could result in criminal sanctions, especially when there was some question as to the validity of the initial determination. This Court has also observed that even when that first proceeding is properly conducted, it cannot provide the basis for subsequent criminal penalties unless the constitutional protections provided are sufficient for sixth amendment purposes. In Baldasar v. Illinois, 446 U.S. 222 (1980), the Court held that an uncounseled midemeanor conviction could not be used to convert a

subsequent misdemeanor into a felony with a prison term.

In the concurring Baldasar opinion, which was adopted in the per curiam decision, Justice Stewart, joined by Justices Brennan and Stevens, found the imprisonment constitutionally impermissible because Baldasar was subjected to criminal sanctions on the basis of a misdemeanor proceeding in which he was without the constitutional safeguards that would have been required in a criminal trial. "The sentence [Baldasar] actually received would not have been authorized by statute but for the previous conviction. It was imposed as a direct consequence of the uncounseled conviction and is therefore forbidden." Id. at 228.

As in Baldasar, an alien does not receive appointed counsel in the

initial proceeding. But also as in Baldasar, an alien is subject to criminal sanctions under Section 1326 as a direct result of the first uncounseled hearing. As the concurrence stated in Baldasar, "a rule that held a conviction invalid for imposing a prison term directly, but valid for imposing a prison term collaterally, would be an illogical and unworkable deviation from our cases." Id. at 228-29.

For several reasons this central constitutional concern expressed first in Spector and echoed in Baldasar -- that criminal penalties not be imposed on the basis of a determination made without proper safeguards -- is not cured by the direct review provisions of Section 1105a or the alternative remedies set forth in Section 1326.

The problem articulated in Spector was not the consequence of the absence of any judicial or administrative review procedures available at that time. While there was some dispute at the time Spector was decided as to the applicability of the Administrative Procedure Act, id. at 179, this Court noted in Heikkila v. Barber, 345 U.S. 229, 234 (1953) that the writ of habeas corpus was available to challenge an order of deportation. In the face of both present and possible remedies, the Spector Justices nonetheless found constitutionally deficient the practice of using a determination of deportability -- made without due process safeguards -- as conclusive in a criminal proceeding.

The provision of Section 1326 that permits a deported alien to apply to the Attorney General, from outside the

country, for permission to reenter the United States after being deported likewise does not cure the constitutional defect of § 1326. Even if an alien knows to make such application, see Point II.A.2, infra, Immigration and Naturalization Service ("INS") procedures do not contemplate the Attorney General reviewing the underlying validity of the deportation order as a basis for determining admissibility.

The procedure provided by the agency to apply for permission to reenter pursuant to Section 1326 is through INS Form I-212, a copy of which is reproduced in the Addendum, attached hereto. This form only asks the applicant to state his "[r]easons for desiring to enter the United States." The INS Commissioner has ruled that the factors governing whether consent is to be

granted are equitable: the applicant's moral character, the recency of his deportation, whether his services are needed in the United States and his length of residence here. In re Lee, 17 I. & N. Dec. 275 (BIA 1978). Thus, there is no evidence that due process violations would even be considered by the Attorney General in a Section 1326 application, and an uncounseled applicant would have no way of knowing whether such due process issues might be raised.

Finally, the remedy of direct administrative or judicial review of a deportation order does not provide, in operation, an opportunity for review that is sufficiently reliable to permit the imposition of criminal sanctions on an uncounseled alien. Even a counseled alien, well aware of the process of appeal, risks the summary dismissal of his

case should he not articulate the grounds for his appeal with the requisite specificity. 8 C.F.R. §3.1(d) (1-A). See also Townsend v. INS, 799 F.2d 179, 182 n.2 (5th Cir. 1986) (noting "harshness" of result, court affirmed Board's dismissal of asylum applicant's appeal from deportation order since alien did not precisely indicate reason for appeal on the INS form); In re Valencia, Int. Dec. 3006 (BIA 1986) (dismissing appeal where reason for appeal not given with specificity). Thus, an alien ordered deported in a mass hearing without counsel is not in a position to exercise meaningfully his right to administrative or judicial review. See Point II.A.2. infra.

2. There Must Be An "Adequate" Opportunity For Review Of A Civil Proceeding Before It May Constitutionally Result In Criminal Sanctions

As this Court has found, in the absence of a meaningful opportunity to appeal the administrative decision, collateral attack in a subsequent criminal proceeding cannot be barred. Yakus v. United States, 321 U.S. 414 (1943). Although the Yakus Court was compelled by the facts to forbid a collateral challenge to the validity of a civil determination, Yakus reached that conclusion only once it determined that petitioners had already been given an "adequate" opportunity for review of the civil proceeding. The Court measured the adequacy of that review not merely by its existence in theory but by its availability in fact.

The petitioners in Yakus were convicted on criminal charges after an administrative tribunal had found that they had violated the price limits established by the Office of Price Administration during World War II. When the petitioners attempted to attack collaterally the administrative decision in the subsequent criminal prosecution, without first having exhausted the exclusive civil appeals route provided, the Court held that due process did not compel permitting petitioners to do so.

The Court in Yakus was careful to limit its holding, and indicated that collateral attack was required where by "statutory command or in operation [the appeals process] will deny, to those charged with violations, an adequate opportunity to be heard." Id. at 446 (emphasis added). Because the petition-

ers in Yakus had not made any showing "that the statute withholds judicial remedies adequate to protect [their] rights," id. at 434, or advanced any reason why they could not exhaust, id. at 437, the Court barred collateral attack.[10]

In contrast to the petitioners in Yakus who were businessmen with well-defined commercial interests and the

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[10] The limits on the government's ability to use an agency determination as conclusive proof of an element of a criminal offense has been noted in other contexts as well. In Estep v. United States, 327 U.S. 114 (1946), this Court protested against the use in a criminal proceeding of an agency determination that had been previously made without constitutional protections. "We are loath to believe that Congress reduced criminal trials under the [Selective Training and Service] Act to proceedings so barren of the customary safeguards which the law has designed for the protection of the accused." Id. at 122.

knowledge, resources and counsel to defend those interests, aliens in deportation proceedings often appear without the benefit of counsel or representation of any kind and do not engage in a calculated tactical choice.[11] Aliens typi-

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[11] The Government's reliance on Walker v. Birmingham, 388 U.S. 307 (1967) is similarly misplaced. The issue facing the Court as well as the characteristics of the litigants were fundamentally different than those here. In Walker a group of black ministers had scheduled demonstrations against the city's segregation laws. In the face of an injunction prohibiting the march without first obtaining a permit, the organizers nonetheless held a demonstration. Facing the Court was a fundamental question of how to protect the integrity of the judicial process and the efficacy of its power if it permitted the injunction to be violated. Without coercive means to enforce its will, only steadfast insistence upon obedience to judicial orders could ensure the courts' continued ability to adjudicate disputes definitively. Here, by contrast, the Court faces the question of the proper protection for a criminal defendant. The min-

(Footnote continued)

cally are not able to pursue judicial remedies due to ignorance, indigency or intimidation.

The judicial record and scholarly commentary on both the nature of immigration proceedings, as well as the particular disabilities that handicap the persons who are the subjects of those hearings, indicate that aliens are severely disadvantaged in deportation proceedings. Aliens face laws and a bureaucracy that courts and commentators alike have condemned as "labyrinthine,"

(Footnote 11 continued from previous page)
isters, unlike the respondents here, were making a conscious and strategic choice. Here, respondents did not have the understanding of the intricacies of the proceedings that would have allowed them to make an intelligent and knowing choice. These are hardly the circumstances that permit the "adequate opportunity" for appeal that Yakus required.

Corniel-Rodriguez v. INS, 532 F.2d 301, 304 (2d Cir. 1976), and "a system of secret law." K. Davis, Administrative Law 86 (2d ed. 1965); and the opaqueness of the proceeding in which aliens find themselves is further aggravated by the all-too-frequent failure of immigration officials to provide sufficient notice to the aliens of their rights or opportunities for relief. See, e.g., Duran v. INS, 756 F.2d 1338, 1341 (9th Cir. 1985); Villegas v. INS, 745 F.2d 950, 951 (5th Cir. 1984); Partible v. INS, 600 F.2d 1094, 1096 (5th Cir. 1979).

Other practices present in the instant case are not unique, as a review of recent judicial decisions reveals. For example, the difficulty of obtaining an adequate hearing when the proceeding is conducted en masse was recognized in United States v. Calles-Pineda, 627 F.2d

976, 977 (9th Cir. 1980); the unfairness of having claims adjudicated without the assistance of a competent translator was held to be a violation of due process in Augustin v. Sava, 735 F.2d 32, 38 (2d Cir. 1984); and the disorientation and interference with statutory rights that may result from transferring aliens from one detention site to another was condemned in Rios-Berrios v. INS, 776 F.2d 859, 863 (9th Cir. 1985). A deportation order issued under the circumstances described in these cases lacks the indicia of reliability that this Court has required before permitting such a proceeding to form the basis for criminal sanctions.

B. This Court Has Barred Collateral Attack Only Where Congress Explicitly Intended To Impose Criminal Sanctions Based On The Mere Fact Of A Predicate Act

In Lewis v. United States, 445 U.S. 55 (1980), the Court interpreted a provision of the Omnibus Crime Control and Safe Streets Act of 1968 that imposed criminal sanctions on a felon for possession of a firearm. In deciding whether the validity of the underlying felony conviction could be collaterally attacked, the Court looked specifically at the legislative history of the statute. The Court held that Congress had clearly intended that the fact, not the reliability, of the predicate conviction was sufficient for criminal liability. This conclusion was based on lengthy and explicit evidence of Congressional intent which stands in stark contrast to the

contrary legislative history of the statute before the Court in the instant case. See Point I, supra.

The Court explicitly distinguished its holdings from those predecessor cases that had permitted collateral attack on an unconstitutional predicate conviction[12]. As the Court in Lewis pointed out, in those cases "this Court found that the subsequent conviction or sentence violated the Sixth Amendment because it depended on the reliability of a past uncounseled conviction." Lewis v.

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[12] Loper v. Beto, 405 U.S. 473 (1972) (uncounseled conviction cannot be used to impeach the general credibility of a witness); United States v. Tucker, 404 U.S. 443 (1972) (previous conviction cannot be used to determine the sentence in a subsequent one); Burgett v. Texas, 389 U.S. 109 (1967) (an uncounseled conviction cannot be used for enhancement of punishment under a State's recidivist statute).

United States, 445 U.S. at 67. By contrast, the legislative history of the statute at issue in Lewis made clear that the "mere fact of conviction, or even indictment" was sufficient for liability. Id.

The Court itself explained that the result in Lewis as compelled by the "obvious breadth" of the statutory language as well as by Congress' "expansive legislative approach," id. at 61, in providing "a sweeping prophylaxis, in simple terms, against misuse of firearms." Id. at 63. Indeed, so sweeping was the statute that its prohibitions against firearms possession applied even to those individuals who had merely been indicted for a felony. Id. at 64. Since the mere taint of an indictment was deemed a sufficient predicate by Congress, the Court concluded that the leg-

islature had intended the statute's prohibitions to embrace even those whom the Government had only probable cause to believe had committed a felony. The Court concluded that such a sweeping intent was the consequence of the unique events, "political assassinations, riots and other violent crimes involving firearms that occurred in this country in the 1960's," which precipitated the passage of the provision at issue in Lewis. Id. at 63.[13]

The decisions that have succeeded Lewis have acknowledged, implic-

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[13] Key among those events was the murder of Dr. Martin Luther King, Markham v. United States Dept. of Treasury, 594 F. Supp. 9, 11 (E.D. Mich. 1983), aff'd, 743 F.2d 397 (6th Cir. 1984), citing legislative history contained in Stevens v. United States, 440 F.2d 144, Appendix A at 152-158 (6th Cir. 1971).

itly or explicitly, that case's singular outcome.[14] Baldasar, for example, decided only four months after Lewis, does not mention Lewis even though it also

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[14] Even if Lewis could be accepted as the articulation of a general rule, the fundamentally different postures in which the defendant there and the aliens here find themselves must show such a rule's inapplicability in this context. A previously convicted felon, such as the defendant in Lewis may collaterally attack in a habeas corpus proceeding the continuing effects of his unlawful conviction. An alien, by contrast, having unknowingly foregone his opportunity for review, is left with no meaningful avenue of appeal even should egregious due process violations be discovered. Ironically, the very flaws that the writ of habeas corpus remedies are just those suffered by aliens in deportation proceedings. As this Court stated, the writ: "extends . . . to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights." Waley v. Johnston, 316 U.S. 101, 104-05 (1942) (emphasis added).

addresses the issue of collateral attack. The Court's substantive reliance on Lewis has been only for its explication of The Omnibus Crime Control and Safe Streets Act of 1968. See, e.g., Ball v. United States, 105 S. Ct. 1668, 1672 (1985); Dickerson v. New Banner Institute, Inc., 460 U.S. 103, 110 (1982).

Following the rule most recently expressed in Baldasar, an alien subject to the criminal proceeding of Section 1326 must be permitted to challenge collaterally the validity of the initial deportation order. Baldasar would require this outcome even when the original proceeding was constitutionally proper. The issue, as explained by the Court, is not whether the first proceeding passes constitutional muster on its own, but rather whether the safeguards in that hearing are sufficient to permit the

deprivation of the individual's liberty in a later proceeding. For all the reasons that this Court found that the initial proceedings in Baldasar, Lopez, Burgett and Tucker too unreliable to determine conclusively a material element in a subsequent criminal proceeding, the deportation hearing also is too unreliable to constitute the grounds for a Section 1326 conviction.

Nothing in Lewis or Yakus is to the contrary. Rather, Lewis by its own words sets itself apart from the current jurisprudence of collateral attack, relying instead on the extraordinary legislative history and expansive and unambiguous Congressional intent in the Omnibus Crime Control and Safe Streets Act that is absent here, and Yakus bars collateral attack only where litigants had an adequate opportunity to appeal the first

proceeding -- an opportunity unavailable to aliens in deportation proceedings. Thus fundamental fairness requires that aliens in Section 1326 proceedings be permitted to challenge the validity of the underlying deportation order.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,*

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Dated: New York, New York
December 19, 1986

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ADDENDUM

U.S. Department of Justice
Immigration and Naturalization Service

Application for Permission to Reapply for Admission Into the United States After Deportation or Removal

OMB No. 1115-0099
Approval Expires 3-85

(To be filed in duplicate)

Read Instructions on Reverse

Date _____

Fee Stamp

I request permission to reapply for admission into the United States.

1. Name *(Last)* *(First)* *(Middle)*	2. File numbers on correspondence from U.S. Immigration Service *(if known)*
3. Name used when last deported or removed from the U.S.	4. Date of Birth
5. Other names used or known by	6. Place of Birth *(city or town; state or province; and country)*
7. Circumstances under which deported or removed from the United States *(check applicable blocks)* ☐ Excluded and deported *(less than one year ago)* ☐ Arrested and deported *(less than five years ago)* ☐ Removed after having fallen into distress *(less than five years ago)* ☐ Removed as alien enemy *(less than five years ago)* ☐ Removed at U.S. Government expense in lieu of deportation *(less than five years ago)*	8. Length of residence in the United States *(years)* 9. Place of residence at time of deportation or removal from United States *(city and state)* 10. Place Deportation Hearing held or application for removal made *(city)*
11. Country to which deported or removed	12. Detention facility or jail where detained *(city and state) (if not detained, write "None")*
13. Date of deportation or removal from United States	14. Port of Departure from United States
15. Status desired if permitted to re-enter United States ☐ Permanent Resident ☐ Visitor ☐ Student ☐ Other *(specify)*	16. Reasons for desiring to re-enter the United States
17. Location of American Consulate where application for visa will be made *(city and country)*	18. Name and relationship of United States citizen or lawful resident alien spouse, parent or children, if any
19. Signature of Applicant	20. Street and number; city or town; state or province; and country of present residence

SIGNATURE OF PERSON PREPARING FORM, IF OTHER THAN APPLICANT

21. I declare that this document was prepared by me at the request of the applicant and is based on all information of which I have any knowledge.

(Signature) (Address) (Date)

THIS SPACE FOR USE OF IMMIGRATION OFFICER

Decision

Date of Action

DD or OIC Office

Form I-212
(Rev. 5-5-83) N

RECEIVED	TRANS. IN	RET'D-TRANS. OUT	COMPLETED

BEST AVAILABLE COPY

INSTRUCTIONS

Submit application in duplicate.

PERSONS WHO ARE PERMITTED TO REAPPLY FOR ADMISSION WITHOUT FILING THIS APPLICATION

1. Persons who were excluded from admission and deported *more than one year ago.*
2. Persons who *voluntarily* departed from the United States without expense to the United States Government and without an order of deportation having been entered.
3. Persons who have been outside the United States for five successive years following their last deportation or removal.

WHERE TO SUBMIT APPLICATION

1. If you are abroad and intend to apply for an immigrant visa, submit the application to the District Director of the Immigration and Naturalization Service of the district in which your deportation proceedings were held, unless you are concurrently applying for a waiver of grounds of excludability under Section 212(g), (h), or (i) of the Immigration and Nationality Act, as amended. In the latter event, this application should be filed with the American Consul with whom you are also filing your application for a waiver of the grounds of excludability. If you are abroad and intend to apply to an American Consul for a nonimmigrant visa or a border crossing card, this application should be filed with the American Consul with whom you are also filing your application for nonimmigrant visa or border crossing card, if requested to do so by the Consul.

2. If you are at a port of entry into the United States, applying for admission into the United States, submit the application to the District Director of the Immigration and Naturalization Service having jurisdiction over that port:

3. If you are in the United States and will file an application for waiver under Section 212(g), (h), or (i) of the Immigration and Nationality Act with an American consul you should file this application and the application for the waiver simultaneously with the American consul. If you are in the United States and are applying for adjustment of your status under Section 245 of the Act, or are seeking to be granted advance permission to reapply prior to your departure from the United States, submit the application to the District Director of the Immigration and Naturalization Service having jurisdiction over the place where you are residing.

WHAT MUST ACCOMPANY YOUR APPLICATION

1. CORRESPONDENCE that you have in your possession relating to your deportation.

2. If you have listed any relative under Item 18 on the front, you must submit documentary evidence of your relationship to such person. In addition, if such person is a U.S. citizen, you must submit proof. If he/she is not a U.S. citizen, you must furnish such person's *full* name, date and place of birth and date and place of admission to the United States, and his/her Alien Registration number, if known.

3. If you wish, you may attach a statement giving the facts you believe the Immigration and Naturalization Service should consider in making a decision on your application, and you may attach any evidence in support of your statement.

4. Fee.

A fee of thirty-five dollars ($35) must be paid for filing this application. It cannot be refunded regardless of the action taken on the application. DO NOT MAIL CASH. ALL FEES MUST BE SUBMITTED IN THE EXACT AMOUNT. Payment by check or money order must be drawn on a bank or other institution located in the United States and be payable in United States currency. If you reside in Guam, check or money order must be payable to the "Treasurer, Guam." If you reside in the Virgin Islands, check or money order must be payable to the "Commissioner of Finance of the Virgin Islands." All other applicants must make the check or money order payable to the "Immigration and Naturalization Service." When check is drawn on account of a person other than yourself, your name must be entered on the face of the check. If application is submitted from outside of the United States, remittance may be made by bank international money order or foreign draft drawn on a financial institution in the United States and payable to the Immigration and Naturalization Service in United States currency. Personal checks are accepted subject to collectibility. An uncollectible check will render the application and any document issued pursuant thereto invalid. A charge of $5.00 will be imposed if a check in payment of a fee is not honored by the bank on which it is drawn.

NOTE: *Attach all correspondence in your possession relating to your deportation*

BEST AVAILABLE COPY

GPO 899-221